Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1994

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

Petitioner,

vs.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit erred in creating new common law that the general principals of commercial suretyship law have no applicability to a surety for distilled spirits excise taxes.

2. Whether the Fifth Circuit erred in creating new common law that under no circumstances, regardless of how egregious, can the United States be estopped to collect on a distilled spirits bond.

3. Whether the designation of a distilled spirits bond as both a "withdrawal" bond and a "unit" bond results in the designation of the bond as a "withdrawal" bond being mere surplusage under the federal statutory scheme set out in 26 U.S.C. § 5173.

INTERESTED PERSONS

PETITIONER

Fidelity and Deposit Company of Maryland which is wholly owned by F & D Holding Corporation which in turn is owned by Swiss Re Holding (North America) Inc., New York, New York and Zurich Insurance Company, Zurich, Switzerland.

The bonds at issue in the underlying case were secured by a letter of credit issued by American Bank, a Texas State Bank.

Petitioner is represented by Stephen W. Schueler and Linda D. King of Winstead Sechrest & Minick P.C. of Houston, Texas.

RESPONDENT

United States of America. Respondent is represented by Gary R. Allen, John A. Dudeck, Jr. and Linda Mosakowski of the Department of Justice, Tax Division.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 10 F.3rd 1150 (5th Cir. 1994) and is reproduced as Appendix A. Rehearing was denied and a copy of the Order Denying Rehearing is reproduced as Appendix B. The unpublished opinion of the District Court for the Southern District of Texas which granted summary judgment for the United States is reproduced as Appendix C. The order of the District Court Amending the Summary Judgment is reproduced as Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on January 7, 1994. (App. A). Rehearing was denied February 7, 1994 (App. B). This Petition for Writ of Certiorari was filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

This case requires consideration of the following statutes and regulations, the full text of which are set forth in Appendix "E" hereto:

26 U.S.C. § 5173
26 U.S.C. § 6103
27 C.F.R. Alcohol, Tobacco & Firearm § 19.519

STATEMENT OF THE CASE

Bay River Company, Inc. ("Bay River") operated a bottling facility in Bayside, Texas. In order to comply with federal statutes governing distillers, Bay River obtained a distilled spirits bond from Fidelity & Deposit Company of Maryland ("Fidelity & Deposit") issued October 5, 1984 (the "1984 Bond"). The total amount of the 1984 Bond was $350,000.00 which was designated on the back of the bond form as being $250,000.00 of withdrawal coverage and $100,000.00 of operations coverage. On the front of the bond form are printed boxes to be checked to indicate the "type of bond prescribed under 26 U.S.C. § 1573." Boxes for "withdrawal bond" and "unit bond" are checked; however the box for "operations bond" is not.

At all times relevant the Bureau of Alcohol, Tobacco and Firearms ("ATF") assessed taxes and enforced the regulations governing distilleries. The actual collection of the excise taxes was handled by the Internal Revenue Service ("IRS"). If a distiller failed to pay its taxes when due, the IRS would notify the ATF which would commence enforcement actions.

From the beginning of its operations in November 1984, Bay River failed to comply with the federal regulations governing distillers. An ATF audit for the period November 1984 to June 1985 revealed numerous violations, including Bay River's failure to properly calculate and timely pay its taxes. As a result of these violations the auditor recommended that, "The proprietor's tax payments should be carefully monitored. Any late filing or payment should trigger an immediate investigation with further action appropriate to the situation."

As early as October 1985, Bay River began issuing a series of checks to pay its excise taxes that were returned unpaid to the IRS after being dishonored by the bank. The IRS regulations in effect during that time required that the service center manager of the IRS immediately call the ATF Chief of Technical Services to inform him of the dishonored check; that telephone call would be followed with a bill for

collection (designated as Optional Form 1114) which was sent to the taxpayer along with the dishonored check, with a copy to the Regional Director of ATF.

If the taxes were not paid within 30 days the IRS would send a second copy of the bill for collection to the ATF marked "unpaid". This procedure assured that the ATF would receive 3 notifications from the IRS of each dishonored check; i.e. a phone call and two copies of the bill for collection sent at 30 day intervals.

The Code of Federal Regulations, Alcohol Tobacco and Firearms, require that when the ATF was notified that a taxpayer's check had been returned unpaid, it was to place the taxpayer on a cash prepayment basis until all defaults were cured and a determination made that the revenue would not be jeopardized by acceptance of a check. 27 C.F.R. § 19.519 (1986). On February 4, 1986 the ATF placed Bay River on prepayment status. The ATF's written notification to Bay River instructed that all future taxes were to be paid in cash or by cashier's check prior to any withdrawals. Contrary to the regulations, the Regional Director of Compliance for the ATF, orally agreed to allow Bay River to continue to pay its excise taxes by company check even though Bay River owed in excess of $100,000.00 in back taxes at that time. On February 13, 1986 the ATF was notified by the IRS that another of Bay River's checks had been returned unpaid, but still, the ATF did not enforce the prepayment requirement.

The ATF conducted a second audit of Bay River covering the period of July 1, 1985 through March 6, 1986. This audit revealed that Bay River's excise taxes were not being accurately determined or timely paid and that Bay River was not complying with the tax prepayment requirement. At the time of the second audit Bay River's overdue tax liability for returned, unpaid checks was in excess of $441,346.91. Although Bay River's unpaid tax liability had continued to increase, the ATF did not enforce the prepayment requirement (even though Bay River was still on prepayment status) or make demand against the 1984 Bond. The second audit

recommended that Bay River obtain a strengthening bond to cover its tax obligations.

Between April and June of 1986 the ATF wrote to Bay River four times about its failure to timely file its tax returns and warning that continued failure to comply with the tax laws and regulations could result in action being taken against its permit.

Finally, in October 1986, the ATF wrote to Bay River that because Bay River's checks were being returned unpaid to the IRS, it was withdrawing the earlier agreement to allow payment by company checks and that all future excise taxes would have to be paid in cash prior to withdrawals. Contrary to this letter, however, the ATF still did not enforce the prepayment requirements set forth in the Code of Federal Regulations. By this time Bay River's unpaid tax liability was in excess of $600,000.00.

The ATF took no action with respect to the delinquent taxes owing from Bay River even though part of the tax liability was more than a year old. The ATF did not make demand against the 1984 Bond, enforce the prepayment requirement or revoke Bay River's permit. Bay River continued to write company checks for payment of its excise taxes which were subsequently returned unpaid. As a result, its delinquent tax liability increased to $821,221.64.

Following the ATF's suggestion in the second audit, Bay River requested a strengthening bond from Fidelity & Deposit. In November, 1986 Fidelity and Deposit issued a second bond (the "Strengthening Bond"), totally unaware that Bay River owed in excess of $800,000.00 in unpaid past due taxes and had been placed on prepayment status. The Strengthening Bond increased Fidelity and Deposit's potential liability by an additional $600,000.00 for withdrawal coverage. Although the ATF was fully aware of Bay River's existing defaults, the ATF approved the Strengthening Bond without comment. Subsequent to the issuance of the Strengthening Bond, Bay River wrote bad checks for the payment of taxes which resulted in additional tax liability in

excess of $600,000.00 for which the Government sued Fidelity and Deposit.

The ATF took no enforcement action with regard to Bay River until 1988 when the principal of the company voluntarily came in to discuss the tax liability which, by then, was in excess of $1,000,000.00. When the principal indicated that he was going to liquidate Bay River, ATF made demand on Fidelity and Deposit for the full amount of the 1984 Bond and the 1986 Strengthening Bond.

ARGUMENTS FOR GRANTING THE WRIT

I. THE STRENGTHENING BOND IS A CONTRACT BETWEEN FIDELITY AND DEPOSIT AND THE GOVERNMENT WHICH SHOULD BE GOVERNED BY THE PRINCIPLES OF COMMON LAW RELATING TO SURETYSHIP; HOWEVER THE COURT OF APPEALS DETERMINED THAT BECAUSE THOSE PRINCIPLES ENCOMPASS ELEMENTS SIMILAR TO ESTOPPEL, THE COMMON LAW OF SURETYSHIP DOES NOT APPLY.

The liability of Fidelity and Deposit should be determined under the basic common law principles governing all commercial sureties. Among those is the principle that:

> Where, before the surety has undertaken his obligation the creditor knows facts unknown to the surety that materially increase the risk beyond that which the creditor has reason to believe the surety intends to assume, and the creditor also has reason to believe that these facts are unknown to the surety and has a reasonable opportunity to communicate them to the surety, failure of the creditor to notify the surety of such facts is a defense to the surety.

Restatement of Security § 124 (1941).

The Court of Appeals for the Fifth Circuit applied these principles in *St. Paul Fire & Marine Ins. Co. v. Commodity Credit Corp.*, 646 F.2d 1064 (5th Cir. 1981) and held that the government's failure to disclose material facts to the

sureties concerning the principal's defaults between the time a first bond was issued and a subsequent bond was issued relieved the sureties from liability on the subsequent bond.

In the instant case the Court of Appeals held, without explanation, that *St. Paul Fire & Marine* does not apply to cases involving surety bonds for excise taxes. They further stated that this case should be governed by *Hart v. United States*, 95 U.S. 316, 24 L.Ed 479 (1877) and *United States v. Fulton Distillery, Inc.*, 571 F.2d 923 (5th Cir. 1978) which were cases in which the sureties were seeking to estop the Government from collecting on bonds because of the negligence of government employees in not taking action against the principal quickly enough. Neither *Hart* nor *Fulton Distillery* involved a surety who issued a second bond in reliance on the creditor's failure to disclose material facts.

In *Hart* the surety argued that he should be relieved from his obligation under the bond because the Collector of Internal Revenue, either through negligence or malfeasance, had allowed distilled spirits to be removed from the distillery without first collecting the required tax. This Court disagreed and stated:

> Here the surety was aware of the lien which the law gave as security for the payment of the tax. He also knew that, in order to retain this lien, the Government must rely upon the diligence and honesty of its agents. If they performed their duties and preserved the security, it inured to his benefit as well as that of the Government; but if by neglect or misconduct they lost it, the Government did not come under obligations to make good the loss to him, or what is the same thing release him pro tanto from the obligation of his bond. As between himself and the Government, he took the risk of the effect of official negligence upon the security which the law provided for his protection against loss by reason of the liability he assumed.

Id. at 95 U.S. 318-319.

In *Fulton Distillery* the surety sought to be relieved from its bond obligation because of an eight week delay between the time the IRS first received a dishonored check for the

payment of excise taxes and the time it notified the ATF. The surety argued that the Government owed an implied duty to the surety to put the distiller on prepayment immediately upon learning of the dishonored check and that the eight week delay was a result of negligence which should estop the Government from collecting on the bond. The Court of Appeals, relying on the decision in *Hart*, ruled that the surety by contracting with the Government had accepted the risk of loss attributable to a governmental employees' negligence. *Id.* 926.

The surety in *Fulton Distillery* also argued that it should be relieved from liability because the government's delay in putting the distiller on prepayment increased the risk of loss beyond that for which the surety had contracted. The Court of Appeals did not, as it has in this case, hold that suretyship principles do not apply, but rather ruled that the surety accepted the risk of loss when it issued the bond and nothing the government did after that time could increase that risk. *Id.* at 928.

The Court of Appeals has taken the position in this case that because the contractual principles governing suretyships have some of the same elements as estoppel, those principles do not apply to bonds to secure the payment of excise taxes. That same reasoning was rejected by this Court in *Lyng v. Payne*, 476 U.S. 926, 106 S.Ct. 2333, 90 L.Ed.2d 921 (1986). In *Lyng* the District Court had granted an injunction requiring the Farmers Home Administration (FmHA) to reopen an emergency loan program on the grounds that FmHA had violated its own regulations and failed to give adequate notice of eligibility requirements to participate in the loan program. The Secretary of Agriculture argued on appeal that the relief granted by the District Court shared all of the essential characteristics of an estoppel against the Government and the case should have been analyzed on those terms. The Court of Appeals rejected that argument and this Court agreed stating:

> As the Court of Appeals correctly observed, however, respondents' inability to satisfy the stringent requirements of common-law estoppel does not independently

> decide the case. . . . It may well be that some of the same concerns that limit the application of equitable estoppel against the Government bear on the appropriateness of awarding other remedies that have a close substantial resemblance to an estoppel. We reject, however, petitioners' suggestion that any remedy that can be analogized to an equitable estoppel is necessarily invalid, regardless of the source of the cause of action, unless the plaintiff succeeds in proving all the elements of common-law estoppel.

Id. at 476 U.S. 936, 106 S.Ct. 2340.

Fidelity and Deposit does not dispute the holdings of *Hart* and *Fulton Distillery*. It acknowledges that it accepted the risk of government negligence when it issued the 1984 Bond and has paid its obligation under that Bond. What distinguishes this case from *Hart* and *Fulton Distillery* are the actions of the ATF subsequent to the issuance of the 1984 Bond and prior to the acceptance of the Strengthening Bond by the ATF.

The facts in this instance are undisputed. Prior to approving the Strengthening Bond, the ATF was aware that (i) Bay Rivers' checks for payment of excise taxes were being returned unpaid; (ii) Bay River was insolvent; (iii) Bay River had been "fund floating" (i.e., submitting unpaid accounts receivable to the bank for cash loans to enable it to cover the company checks for taxes); (iv) Bay River was in default of its tax obligations; (v) Bay River was selling its product at a loss; (vi) Bay River's internal record keeping practices were inadequate; and (vii) there was inadequate voluntary compliance on Bay River's part, with the laws and regulations. Any one of the facts would materially increase the risk of loss to Fidelity and Deposit if it issued the Strengthening Bond and in combination would make a loss almost a certainty. No surety would have increased its bond obligation if it knew that the principal already owed $800,000.00 in unpaid taxes. The ATF's failure to disclose the facts known to it resulted in Fidelity and Deposit issuing the $600,000.00 Strengthening Bond upon which the Government is seeking to collect.

The Court of Appeals notes in its Opinion that the ATF may have been prohibited by 26 U.S.C. § 6103 from disclosing taxpayer return information to Fidelity and Deposit. Assuming *arguendo* that the ATF was prohibited from revealing information concerning Bay River's financial condition, nothing in the federal statutes prohibit the ATF from notifying the surety when the taxpayer defaults in the payment of its tax obligations. The ATF could have made demand on the 1984 Bond, enforced the prepayment requirement, or refused to approve the Strengthening Bond. Instead, the ATF recommended to Bay River that it obtain a strengthening bond even though its own audit concluded that Bay River was financially incapable of paying its taxes.

In their Opinion, the Court of Appeals states that "commercial expectations have been satisfied" by refusing to estop the government because "since *Hart* in 1877, sureties have been on notice that they assume the risk of governmental neglect in the collection of excise taxes." They go on to say that the surety could charge a higher fee to compensate for governmental neglect or engage in more active monitoring of the principal. This statement totally ignores the true "commercial expectations." The undisputed evidence is that Fidelity and Deposit would not, for any amount of fee, have issued the Strengthening Bond if it had been aware that Bay River was already in default under the 1984 Bond due to unpaid taxes in excess of $800,000.00. Commercial expectations would dictate that the Government would have taken some action to collect unpaid taxes which it knew had been owing for more than a year. Commercial expectations would also dictate that when the Government learned that Bay River was not paying its taxes it would have attempted to limit the potential loss to the treasury rather than giving permission to Bay River to violate the federal regulations.

Likewise, the statement that Fidelity and Deposit could have protected itself by more closely monitoring Bay River completely ignores the undisputed fact that it was the action of the Government that made it possible for Bay River to hide its financial condition, not only from Fidelity and

Deposit but from the bank from which Fidelity and Deposit sought information. When the IRS received a check that was dishonored by the bank it did not bring action on the check, or even redeposit it, rather it returned the *original* check to Bay River. At the time Fidelity and Deposit issued the Strengthening Bond in 1986, the IRS had returned 14 original checks totalling more than $800,000.00 to Bay River.

Had the IRS redeposited the checks that were dishonored the bank would have been put on notice that there was a problem. Because the checks were returned to Bay River, however, it was able to hide the fact that it owed in excess of $800,000.00 in taxes. Further, the bank like the IRS, was prohibited by Texas law from revealing information concerning its customers to third parties.

The ATF had adequate opportunity to disclose to Fidelity and Deposit the increase in the risk of loss that had occurred between the issuance of the 1984 Bond and the acceptance of the Strengthening Bond in November, 1986 but failed to do so. The ATF had written numerous letters to Bay River threatening to take action against its permit, but repeatedly refused to act. Under the principles governing surety[illegible] and the Court of Appeals' decision in *St. Paul Fire & Marine*, Fidelity and Deposit should be relieved from its liability on the Strengthening Bond.

II. THE COURT OF APPEALS' RULING THAT THE GOVERNMENT MAY NEVER BE ESTOPPED FROM COLLECTING ON EXCISE TAX BONDS DUE TO NEGLECT OR MISCONDUCT REGARDLESS OF HOW EGREGIOUS THE CIRCUMSTANCES, CREATES NEW FEDERAL COMMON LAW WHICH SHOULD BE RULED ON BY THIS COURT

The Court of Appeals held in this case that the Government may never, regardless of the circumstances, be estopped from collecting on a bond for excise taxes. App. A at p. 10. This Court has consistently refused to establish a hard and fast rule relating to estopping the Government. The Court of Appeals established the "no estoppel" rule

based on the decision in *Hart v. United States*, 95 U.S. 316, 24 L.Ed. 479 (1887) in which the Court stated that a surety accepts the risk of governmental negligence or misconduct when it issues a bond for excise taxes. Fidelity and Deposit agrees that it accepted that risk when it issued the 1984 Bond. What distinguishes this case from *Hart* and what the Court of Appeals failed to address, is that Fidelity and Deposit would not have issued the Stengthening Bond in 1986 had it known that Bay River already owed in excess of $800,000.00 in unpaid taxes or that the ATF had violated, and had allowed Bay River to violate, the federal regulations concerning the payment of excise taxes.

The vast majority of the decisions of this Court during the past 25 years in which estoppel against the Government has been discussed, have been cases where a private litigant was seeking to estop the Government from applying a statute or regulation as written based on the representations of a Government agent. *See, e.g., Reno v. Catholic Social Services,* 61 U.S.L.W. 4652, 113S.Ct. 2485, 125 L.Ed.2d 38 (1993); *Office of Personal Management v. Richmond,* 496 U.S. 414, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990); *Heckler v. Community Health Services of Crawford County, Inc.,* 467 U.S. 51, 104 S.Ct. 2218, 81 L.Ed.2d 41 (1984); *United States Immigration and Naturalization Service v. Hibi,* 414 U.S. 5, 94 S.Ct. 19, 38 L.Ed.2d 7 (1973). In each instance this Court has refused to find that the Government is estopped from applying the law as written. As stated in *Office of Personnel Management v. Richmond:*

> We recognize that "not even the temptations of a hard case" will provide a basis for ordering recovery contrary to the terms of the regulations, for to do so would disregard "the duty of all courts to observe the conditions defined by Congress for charging the public treasury."

110 S.Ct. at 2469, *quoting, Federal Crop Insurance Corporation v. Merrill,* 332 U.S. 380, 858-6, 68 S.Ct. 1, 3-4 92 L.Ed. 10 (1947).

In this case, Fidelity and Deposit is not seeking relief contrary to the terms of any regulation or statute. The relative rights and liabilities of Fidelity and Deposit and the Government are established pursuant to contract not statute. If the ATF had not accepted the Strengthening Bond, Fidelity and Deposit would have no liability beyond the 1984 Bond regardless of the amount of the taxes Bay River owes. Likewise, if the ATF had made demand on the 1984 Bond or had complied with or enforced its regulations, Fidelity and Deposit would not have issued a second bond.

The federal courts have held that to establish estoppel against Government one must prove the following elements: (1) that the party to be estopped was aware of the facts, (2) that the party to be estopped intended his act or omission to be acted upon, (3) that the party asserting estoppel did not have knowledge of the facts, (4) that the party asserting estoppel reasonably relied on the conduct of the other to his substantial injury; *Moody v. United States,* 783 F.2d 1244 (5th Cir. 1986), and (5) that the Government agents engaged in affirmative misconduct. *United States Immigration and Naturalization Service v. Hibi,* 414 U.S. 5, 38 L.Ed.2d 7, 94 S.Ct. 19 (1973).

Prior to the time that Fidelity and Deposit issued the Strengthening Bond, the ATF was aware: (i) that Bay River's record keeping procedures were inadequate to give any assurance that the excise taxes were being properly calculated or determined; (ii) that Bay River was insolvent and was fund floating; and (iii) that Bay River had repeatedly violated the regulations governing the operation of the distilled spirits plant. Further, IRS procedures provided the ATF with 42 separate notices that Bay River's checks had been returned unpaid and that Bay River owed delinquent excise taxes.

Second, the party to be estopped must have intended his act or omission to be acted upon. The evidence is undisputed that the ATF hoped to shift the loss to Fidelity and Deposit. The ATF's First Audit, which discovered that Bay

River was exceeding its $100,000.00 withdrawal bond coverage, stated that:

> We conclude that in case of default it is likely that action against the surety will be the Bureau's only recourse to collect the majority of the taxes due.

The auditor then got Bay River to agree to obtain a strengthening bond.

The ATF had formally put Bay River on a tax prepayment basis on February 4, 1986, but the ATF Regional Chief of Compliance orally agreed to continue accepting Bay River company checks. This was a violation of the regulations governing the payment of excise taxes. 27 C.F.R. § 19.519 Even after the ATF was notified on February 13, 1986, that Bay River's company checks were still being returned unpaid, it did not comply with its regulations and enforce the prepayment requirement.

The ATF's Second Audit found repeated violations including Bay River's failure to comply with the prepayment requirement. At the time the Second Audit was conducted Bay River owed in excess of $441,000.00 in delinquent excise taxes. The auditor recommended that Bay River obtain a strengthening bond. Clearly this was the ATF's intent and purpose. By failing to take any action with regard to Bay River's defaults and by requiring a strengthening bond, they hoped to shift the risk of any future losses to Fidelity and Deposit. By failing to disclose Bay River's defaults, the ATF made it possible for Bay River to obtain a strengthening bond. Unless this Court reverses, the ATF will have succeeded in its plan.

The third element in establishing estoppel is that the party asserting estoppel did not have knowledge of the facts. The Government does not dispute Fidelity and Deposit's testimony that it was not aware of Bay River's defaults and bad checks, nor of the violations of statutes and regulations, by both ATF and Bay River, when it issued the Strengthening Bond.

The fourth element is that the party asserting estoppel reasonably relied on the conduct of the other to its substantial injury. Fidelity and Deposit was reasonable in its belief that the ATF would not knowingly and willfully allow Bay River to violate the statutes and regulations concerning the payment of excise taxes. It was also reasonable for Fidelity and Deposit to believe that the ATF would have taken some action when the amount of taxes Bay River owed exceeded $820,000.00 (part of which had been owing for more than a year) especially in light of the fact that Bay River only had $100,000.00 of withdrawal coverage. Silence or a failure to act in the face of a duty to act can be the basis for reliance. *Ohio Casualty Ins. Co. v. United States*, 12 Cl. Ct. 590 (1987). A surety does not contract to assume the risks of unreasonable conduct of a government agent that results in loss to the government. Id.

The fifth element requires a showing that government agents engaged in affirmative misconduct. The District Court paraphrasing *United States v. Fulton Distillery, Inc.*, 571 F.2d 923 (5th Cir. 1978) in its memorandum opinion holds that

> 'The Government's neglect could not have constituted an act which increased the surety's risk and discharged [Fidelity] because the risk of neglect had already been allocated to the surety . . .' The Government owes no duty to a surety for its neglect in this instance."

The actions of the Government go far beyond mere negligence in this case. Bay River was placed on a prepayment basis on February 4, 1986. Although the letter confirming the prepayment requirement expressly states that future tax payments were to be made in cash or by cashier's check, treasury check or money order as required by the federal regulations, the ATF Regional Director of Compliance orally told Bay River that it could continue to pay it taxes by company check.

It is undisputed that, less than 2 weeks after placing Bay River on prepayment, the ATF was informed that yet another Bay River check for payment of excise taxes in the amount of $87,653.59 had been returned unpaid. After

receiving that notice, the ATF did not undertake to enforce the prepayment requirement or make demand on the 1984 Bond. To the contrary the ATF continued to allow payment by company checks so that at the time the Strengthening Bond was approved by the ATF, Bay River had 14 checks for taxes returned unpaid totalling in excess of $820,000.00

The ATF did not inform Fidelity and Deposit of the unpaid taxes nor did it take *any* action against Bay River, even though the ATF audit had concluded that Bay River's financial condition and profit margin made it incapable of paying its taxes. The ATF had already discovered that Bay River was fund floating in order to pay any of its taxes. Knowing this, ATF recommended, in fact, insisted that Bay River obtain the Strengthening Bond. This is the type of *affirmative* conduct that distinguishes the ATF's conduct here from other cases.

The ATF's affirmative acts in requiring the Strengthening Bond, knowing that it had refused to enforce the federal regulations concerning the payment of taxes; its total disregard of the continuing regulatory violations by Bay River and its concealment of Bay River's failure to pay its taxes so that Bay River could obtain a Strengthening Bond certainly constitutes affirmative misconduct on the part of the Government.

III. THE COURT OF APPEALS' DETERMINATION THAT THE DESIGNATION "WITHDRAWAL BOND" ON THE 1984 BOND WAS "HARMLESS SURPLUSAGE" RUNS CONTRARY TO ESTABLISHED RULES GOVERNING THE CONSTRUCTION OF CONTRACTS.

The Fifth Circuit in construing the 1984 Bond considered the designations of the Bond as a "unit bond" and as a "withdrawal bond" and determined that under the federal scheme as set out in the 26 U.S.C. § 5173 "the parties intended that the 1984 Bond provide coverage for both operational and excise taxes to the full amount of that bond," and therefore the designation of the Bond as a withdrawal bond was "harmless surplusage." App. A, pg. 7.

There is no dispute that the designation of the 1984 Bond as a unit bond and a withdrawal bond had to be a mistake. That combination of bonds is not provided for by 26 U.S.C. § 5173. Fidelity and Deposit contends that the 1984 Bond is ambiguous and that the District Court should have denied summary judgment and considered evidence as to the intent of the parties. This position is bolstered by the fact that the District Court found as a matter of law that the 1984 Bond was a $250,000.00 unit bond and $100,000.00 withdrawal bond whereas the Fifth Circuit found as a matter of law that the 1984 Bond was a $350,000.00 unit bond.

Section 26 U.S.C. § 5173 requires that a distiller provide an operations bond and a withdrawal bond or a unit bond. The operations bond and withdrawal bond can be on separate forms, or as the Government concedes, on a single form. The surety can also provide for a unit bond which covers both operations and withdrawals. Subsection (h) of 26 U.S.C. § 5173 provides:

> **(h) Special rules** — For purposes of this section —
>
> **(1) Withdrawal bonds.** In the case of any bond furnished under this section which covers withdrawals but not operations —
>
> **(A)** such bond shall be in addition to the operations bond, and
>
> **(B)** if distilled spirits are withdrawn under such bond, the operations bond shall no longer cover liability for payment of the tax on the spirits withdrawn.

26 U.S.C. § 5173. By designating the 1984 Bond as separate operations and withdrawal bonds Fidelity and Deposit would limits it its withdrawal liability to $100,000.00. It is equally likely that the designation "unit bond" is the harmless surplusage as it is the designation "withdrawal bond."

Neither the District Court nor the Court of Appeals mention in their Opinions the uncontroverted evidence showing that the ATF, which is responsible for approving and enforcing the surety bonds, understood that the 1984 Bond was two separate bonds that limited the withdrawal coverage to

$100,000.00. The ATF audit discusses the withdrawal coverage and includes the auditor's conclusions:

> The proprietor's liability began exceeding his $100,000.00 bond at the end of May 1985 . . . The effect of this is to leave the Government no recourse against a surety for liabilities in excess of $100,000.00 should the proprietor default.

Even in the demand made by the ATF against Fidelity and Deposit in July 1988 they admitted that the withdrawal coverage under the 1984 Bond was limited to $100,000.00. The ATF Chief, Technical Services wrote to Fidelity and Deposit and stated:

> The penalties and interest have not been included for the 1985 and 1986 taxes because the unpaid taxes themselves exceed the $700,000.00 withdrawal bond coverage amount.

(The $700,000.00 is comprised of the $100,000.00 withdrawal coverage and $600,000.00 additional coverage provided by the Strengthening Bond).

Given the obviously conflicting designations in the 1984 Bond the Bond is ambiguous and the United States Motion for Summary Judgment on that issue should have been denied.

CONCLUSION

The Petition for Writ of Certiorari should be granted. The Court of Appeals has created new federal common law which is at odds with existing common law and prior holdings of this Court. Further, the Court of Appeals interpreted the 1984 Bond by disregarding the bond designation to conclude it was a unit bond when, in fact, the bond could have equally been interpreted as withdrawal and operations bonds. The 1984 Bond is ambiguous and a fact issue exists as to the parties' intention. The District Court should, therefore, deny the Motion for Summary Judgment on that issue and heard evidence concerning the parties' intent.

WHEREFORE, Fidelity and Deposit respectfully requests that Writ of Certiorari be granted and that upon due consideration the holdings of the Court of Appeals and the District Court be reversed and this matter be remanded for trial.

Respectfully submitted,

By: _____

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APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FIDELITY AND DEPOSIT COMPANY,
etc., et al., Defendants,

Fidelity and Deposit Company
of Maryland, Defendant-Appellant.

No. 92-2807.

United States Court of Appeals, Fifth Circuit.

Jan. 7, 1994.

Rehearing Denied Feb. 7, 1994.

Government brought action to recover from surety on distillery's two excise tax bonds. The United States District Court for the Southern District of Texas, Melinda Harmon, J., entered summary judgment for government, and surety appealed. The Court of Appeals, Wiener, Circuit Judge, held that: (1) first bond was unit bond, covering both operational and excise taxes, and, therefore, surety was liable for full amount of bond, and (2) government's inaction with respect to excise taxes owed by distillery as of time second bond was issued did not estop it from recovering on second bond.

Affirmed.

1. Federal Courts — 776

Court of Appeals reviews summary judgment de novo, applying same standard as district court. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

2. Federal Civil Procedures — 2514

Summary judgment is appropriate regarding coverage of excise tax bond if that bond is unambiguous.

3. Contracts — 143(2), 176(2)

Whether instrument is ambiguous is question of law that turns on whether instrument can be given certain or definite legal meaning or interpretation.

4. Internal Revenue — 4433

Tax bond issued to distillery was $350,000 unit bonds, covering both operational and excise taxes, so that surety was liable for full $350,000 amount when distillery failed to pay excise taxes, even though boxes indicating type of bond were checked for both unit bond and withdrawal bond, which covers only excise taxes; back of bond contained allocation for withdrawal coverage and for operations coverage as mandated by regulatory scheme for unit bonds, and additional check mark in withdrawal box was not inconsistent with unit bond status as such coverage was subsumed within that status under federal regulations. 26 U.S.C.A. § 5173.

5. Internal Revenue — 4417

Government, regardless of whether it is following its own rules and regulations, owes no implied duties to surety on excise tax bond.

6. Internal Revenue — 4433

Federal government had no implied duty to surety on distillery's two excise tax bonds to engage in more vigorous collection efforts pursuant to federal regulations, to provide surety with direct notice of distillery's precarious financial condition at time distillery issued second bond, or to provide indirect notice of distillery's condition through issuance of demand on first bond, so that government's inaction did not estop it from collecting a second bond.

Stephen W. Schueler, Linda D. King, Winstead, Sechrest & Minick, Houston, TX, for defendant-appellant.

Thomas M. Herrin, U.S. Dept. of Justice, Tax Div., Dallas, TX, Gary R. Allen, Chief Appellate Sect., John A Dudeck, Jr., Jonathan S. Cohen, Linda E. Mosakowski, Tax Div., Dept. of Justice, Washington, DC, for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Texas.

Before JOHNSON, WIENER, and DeMOSS, Circuit Judges.

WIENER, Circuit Judge:

Plaintiff-Appelee the United States of America (the government) sued Defendant-Appellant Fidelity and Deposit Co. of Maryland ("Fidelity") to collect on two bonds issued by Fidelity, one of which was issued in 1984 and the other in 1986. These bonds provided, inter alia, that Fidelity was surety for the payment of excise taxes by a distillery, the Bay River Company ("Bay River"). After the United States moved for summary judgment Fidelity argued that the 1984 bond was ambiguous, thus precluding summary judgment on it, and that governmental neglect should estop the government from collecting on the 1986 bond. The district court disagreed with both contentions and entered summary judgment for the government. Finding no reversible error, we affirm.

I
FACTS AND PROCEEDINGS

The federal government taxes the manufacturing of distilled spirits and requires the operator of a distillery to secure the payment of excise and operational taxes with various surety bonds. To ensure payment of operational taxes, the distiller must obtain an "operations bond" prior to commencing operations. If the distiller intends to remove any product from the distillery prior to payment of excise taxes, the distiller must likewise obtain a "withdrawal bond" to secure payment of any excise taxes due. The distiller has the option to acquire a "unit bond," which provides coverage from the surety for both operational and removal excise taxes.

In 1984 Bay River began operating a distillery and obtained a surety bond from Fidelity, The top right portion of the face of this bond instructs the signers to indicate which type of bond is being issued, namely, an operations, a withdrawal, or a unit bond. On the 1984 bond, the box marked "operations" was left unchecked, whereas the box

marked "withdrawal" and the box marked "unit" were both checked. The face of the bond also contained a box in which to insert the amount of the bond; on this 1984 bond the box was filled in to reflect the sum of $350,000. The back of the bond contained boxes for use in allocating coverage. Of the $350,000 face amount of the 1984 bond, $250,000 was allocated for operations coverage and $100,000 for withdrawaal coverage.

Within its first year of operations, Bay River began to issue checks made payable to the IRS for excise taxes that were returned for insufficient funds ("NSF"). In February 1986, after Bay River had issued three NSF checks for excise taxes totalling $441,346.91, the Bureau of Alcohol, Tobacco, and Firearms ("ATF") placed Bay River on prepayment status.[1] This status meant that Bay River was required to pay by cash or cashier's check before withdrawing any spirits from its plant; ATF nevertheless agreed orally to continue to accept company checks.

In April 1986, ATF conducted the first of three audits of Bay River. The auditors concluded that Bay River was underpaying taxes, financially unstable, and exceeding the withdrawal coverage provided by the 1984 Bond. A second audit in May 1986 disclosed the same essential facts. Meanwhile, company checks issued by Bay River continued to be returned NSF. In addition, by the summer of 1986, ATF became aware that Bay River was "floating" its funds, that is, Bay River was using unpaid accounts as collateral for cash loans to prepay exise taxes.

In November 1986, Fidelity issued Bay River a second bond, this one for $600,000, which provided coverage if Bay River defaulted on payment of its excise taxes. At the time

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[1] The ATF and the IRS, both of which are agencies within the Department of Treasury, shared responsibility for collecting taxes due from Bay River during part of the relevant period. Until July 1987, Bay River paid its excise taxes to the IRS. When those checks were returned NSF, the IRS notified both Bay River and ATF. In July 1987 new regulations required all distilleries, including Bay River, to make payment directly to ATF.

of issuance, the government was aware that Bay River: 1) had issued 14 NSF checks totalling $821,221.64; 2) had violated prepayment requirements; 3) had filed untimely tax returns; 4) had been floating funds; and 5) generally was in poor financial health. When it accepted the 1986 bond, the government did not provide any of this information to Fidelity. In addition, the government had not yet sought recovery on the 1984 bond. Fidelity, for its part, did not contact the government prior to issuing the 1986 Bond and instead relied on financial statements furnished by Bay River, which later proved to be inaccurate.

ATF conducted its third audit in September 1987 and informed Bay River in February 1988 of violations discovered by that audit. In June 1988, the ATF met with Bay River after which the ATF issued a joint demand on Bay River and Fidelity for unpaid taxes. Fidelity tendered $100,000 on the 1984 bond, but denied any further liability on that bond and all liability on the 1986 bond. Fidelity argued that the 1984 bond provided only $100,000 coverage for excise taxes and that neglect in collecting excise taxes estopped the government from collecting on the 1986 Bond.[2]

In August 1989, the government sued Fidelity and Bay River to collect $1,572,714 in unpaid excise taxes. The government acquired a default judgment against Bay River in June 1990. The government moved for summary judgment against Fidelity as surety on the 1984 and 1986 bonds, which judgment was granted by the district court in September 1992. The district court first determined that the

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[2] In its brief, Fidelity intimates that part of the liability imposed on the 1986 bond arises from debts due before that bond was issued. Fidelity uses this alleged fact to argue that the government should be estopped from collecting on the 1986 bond in toto. Curiously, though, Fidelity makes no argument that preexisting debts as such are not covered by the 1986 bond. Instead of raising issues of estoppel, this argument would entail application of general principles of suretyship law to ascertain the limits of the surety relationship. *Cf., St. Paul Fire & Marine Ins. Co. v. Commodity Credit Corp.*, 646 F.2d 1064, 1074 (5th Cir. 1981) (observing that a surety insures performance of a contingent obligation; it is not a guarantor of an existing default).

1984 bond was actually two bonds: a $100,000 withdrawal bond and a $250,000 unit bond. The court thus concluded that the 1984 bond provided $350,000 coverage. Next, the court determined that any governmental neglect in collecting excise taxes did not estop the government from collecting on the 1986 bond. Accordingly, the district court entered summary judgment in favor of the government for $850,000, which reflected the aggregate face amount of the two bonds: $950,000, less the $100,000 payment that Fidelity had tendered. Fidelity timely appealed.

II
DISCUSSION

A. *Construing the 1984 Bond*

[1-3] We review a summary judgment de novo, applying the same standard as the district court.[3] Summary judgment is appropriate when there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."[4] Summary judgment is appropriate here regarding the coverage provided by the 1984 bond if that bond is unambiguous.[5] And whether an instrument is ambiguous is a question of law that turns on whether the instrument "can be given a certain or definite legal meaning or interpretation."[6]

1. *The Regulatory Scheme*

The regulatory scheme regarding excise tax bonds provides the appropriate starting point to determine whether the 1984 bond is ambiguous. Section 5173 of the Internal Revenue Code provides that no person can commence operations at a distillery unless such person has obtained an

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[3] *E.g., D.E.W., Inc. v. Local 93, Laborers' Int'l Union,* 957 F.2d 196, 199 (5th Cir.1992); *Fireman's Fund Ins. Co. v. Murchison,* 937 F.2d 204, 207 (5th Cir.1991).

[4] FED.R.CIV.P. 56(c).

[5] *See, D.E.W., Inc.* 957 F.2d at 199 (noting that an unambiguous contract can be construed as a matter of law).

[6] *Id.* at 199.

operations bond, and that no distilled spirits may be withdrawn from a distillery without payment of excise taxes due unless the distiller has obtained a withdrawal bond.[7] Section 5173 further provides that the Secretary of the Treasury may promulgate regulations allowing for a unit bond to cover both operations at, and withdrawals from, a distillery.[8]

The regulations promulgated by the Secretary provide that the total amount of a unit bond shall be available for satisfaction of *any* liability — irrespective of whether liability arises from operational or excise taxes — incurred under the terms and conditions of such bond.[9] The regulations further provide that the unit bond must allocate the total sum into "penal sums" for operations and withdrawals.[10] Although the surety remains liable up to the total amount of the unit bond, the "penal sum" for withdrawals sets the limit for such withdrawals from the distillery.[11]

2. *Application to the 1984 Bond*

[4] The provisions in the 1984 bond may be construed together in conformity with applicable federal statutes and regulations only if that bond is construed as a $350,000 unit bond.[12] The back of the 1984 bond contains the allocation ($100,000 for withdrawal coverage and $250,000 for operations coverage) mandated by the regulatory scheme for unit bonds. The face contains a check in the unit bond box, which, in addition to being consistent with the allocation of

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[7] *26 U.S.C.* § 5173(a).

[8] *26 U.S.C.* § 5173(c).

[9] 27 *C.F.R.* § 19.244 (1993); *see also*, 26 *U.S.C.* § 5173(g) (providing that "[t]he total amount of any bond furnished under this section shall be available for the satisfaction of any liability incurred under the terms and conditions of such bond").

[10] 27 *C.F.R.* § 19.244 (1993).

[11] *Id.*

[12] *Cf., Chapman* v. *Orange Rice Milling Co.*, 747 F.2d 981, 983 (5th Cir. 1984) (observing that a court must attempt to harmonize all provisions contained in an agreement in order to construe that agreement to give effect to the parties' intent).

coverage contained on the back, also indicates that the parties intended that the 1984 bond provide coverage for both operational and excise taxes to the full amount of that bond. The additional check in the withdrawal box is not inconsistent with unit bond status as such coverage is subsumed within that status under the federal regulations. This check is thus properly characterized as harmless surplusage under the applicable regulations.

In contrast, the construction offered by Fidelity conflicts with the intent of the parties as manifested by the face of the 1984 bond. Fidelity posits that the 1984 bond represents two separate bonds: an operations bond for $250,000 and a withdrawal bond for $100,000. Yet the face of the 1984 bond contains checks in only the unit and withdrawal bond boxes. Thus, Fidelity's construction would have us ignore the check of the unit bond box — which imposes liability for both operational and excise taxes to the full amount of the bond — and would require us to deem the existence of a check in the operations box, which is totally blank. We are unwilling to take either step.

The district court's construction — that the bond is a $250,000 unit bond and a $100,000 withdrawal bond — likewise fails for it runs afoul of federal regulations.[13] Such a construction would require the parties to fill in two lines on the back of the bond: one line for the amount of withdrawal coverage for the withdrawal bond under 27 C.F.R. § 19.243, and the other line for the allocation between operations and withdrawal coverage for the unit bond under 27 C.F.R. § 19.245. That simply does not make sense.

As the 1984 bond is consistent with federal regulations only if it is construed as a $350,000 unit bond, we conclude that this bond must be unambiguously construed to be such.

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[13] The attempt by the district court to create two bonds here is also inconsistent with the language used in the 1984 bond, which refers to the instrument throughout in the singular as a "bond." Fidelity's attempt to create two bonds, albeit of different stripes than the ones created by the district court, likewise is inconsistent with the singular language used in the 1984 bond.

Any other construction would be nonsensical under federal law, as such constructions would require us either to rewrite the bond or to make the bond conflict with federal law.[14] Although the district court erred in its reasoning it reached the correct result on this issue, i.e., that Fidelity was liable for $350,000. Consequently, the district court's judgment imposing $350,000 liability (less the earlier $100,000 payment by Fidelity) on the 1984 bond need not be reversed.[15]

B *Estoppel and the 1986 Bond*

Few reported cases address the estoppel doctrine when the government is the beneficiary of a surety bond for excise taxes. The seminal case is the venerable 1877 Supreme Court decision of *Hart v. United States*.[16] In *Hart* a surety attempted to avoid liability on an excise tax bond by arguing that liability was caused by the illegal acts of a revenue agent, namely, allowing the distiller to remove spirits without paying taxes.[17] The Court rejected any defense based on estoppel, stating that "[t]he government is not responsible for the laches or wrongful acts of its officers. Every surety upon an official bond is presumed to enter into this contract with a full knowledge of this principle of law, and to consent to be dealt with accordingly."[18] The Court further stated that "[the government] never becomes bound to others from [the] neglect [of its officers], unless it is by express agreement

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[14] *See, e.g., Consul Ltd.* v. *Solide Enterprises, Inc.*, 802 F.2d 1143, 1149 (9th Cir.1986) (observing that contractual language is interpreted whenever possible to uphold the validity of the contract); *Ford Motor Credit Co.* v. *Powers*, 613 S.W.2d 30, 33 (Tex.Civ.App. — Corpus Christi 1981, no writ) (concluding that reasonable doubt about the construction of a contract should be resolved in favor of legality).

[15] *See, e.g., Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351,1355 n. 3 (5th Cir. 1986) (observing that a grant of summary judgment may be affirmed on grounds that differ from the ones relied on by the district court).

[16] 95 U.S. 316, 24 L.Ed. 479 (1877).

[17] *Id.*, 95 U.S. at 317.

[18] *Id.* at 318.

to that effect,"[19] and concluded "[a]s between himself and the government, [the surety] took the risk of the effect of official negligence."[20]

Over one hundred years later, in *United States v. Fulton Distillery, Inc.*[21], we revisited the surety-government relationship. Once again, the government was suing to collect on an excise tax bond issued by a surety.[22] And once again, the surety attempted to avoid liability by arguing that governmental inaction estopped the government from collecting on the bond. Specifically, the surety complained that the government failed to put the distiller on a cash prepayment plan for excise taxes until eight weeks after the government had received the first dishonored check.[23] The surety reasoned that this action violated an implied duty arising from the applicable govermental regulations, and that such action also increased the surety's risk, which, under general suretyship law, should discharge the surety.[24]

Reaffirming reliance on *Hart*, we rejected both of the surety's arguments.[25] We first concluded that any dispute regarding the collection of an excise tax bond is governed by federal law.[26] We then rejected the *implied duty* argument by concluding that, *Hart* controlled — the government could only assume such a duty by statute or by *express* agreement.[27] Quoting *Hart*, we likewise rejected any argument concerning governmental acts that may have increased the surety's risk: "[a]s between [the surety] and the government, [the

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[19] *Id.*

[20] *Id.* at 319.

[21] 571 F.2d 923 (5th Cir.1978).

[22] *Id.* at 924.

[23] *Id.* at 925-26.

[24] *Id.* at 926.

[25] This court concluded that *Hart* was not overruled by the *Erie* revolution because *Hart* had been cited with approval post-*Erie* by the Supreme Court. *Id.* at 927 n. 9.

[26] *Id.* at 926-27.

[27] *Id.* at 927.

surety] took the risk of the effect of official negligence." [28] In *Fulton Distillery* we concluded by observing that, under federal law, a surety has been on notice of this principle for over 100 years. [29]

[5, 6] Relying on *Fulton Distillery* and *Hart*, the district court in the instant case concluded that Fidelity could not assert estoppel against the government. As the district court correctly surmised, *Hart* and *Fulton Distillery* control here. Condensed to its essence, Fidelity's complaint is premised on the notion that the government owed it an implied duty to act — by more vigorously engaging in collection efforts pursuant to federal regulations (thereby lowering Fidelity's exposure to risk), by providing Fidelity with direct notice of the precarious financial condition of Bay River,[30] or by providing indirect notice of Bay River's financial condition through the issuance of a demand on the 1984 bond. Both *Hart* and *Fulton Distillery* make it clear, though, that the government — regardless of whether it is following its own rules and regulations[31] — owes no *implied* duties to a surety on an excise tax bond.[32]

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[28] *Id.* (quoting *Hart*, 95 U.S. at 319).

[29] *Id.*

[30] Fidelity's effort to impose a duty to disclose information regarding the financial status of the principal is problematic under *26 U.S.C.* § 6103(a). Section 6103 provides that "return information" shall not be disclosed, and in *Chamberlain v. Kurtz*, 589 F.2d 827, 840-41 (5th Cir.) *cert. denied*, 444 U.S. 842, 100 S.Ct. 82, 62 L.Ed.2d 54 (1979), we construed "return information" broadly to include any information gathered by, or generated internally by, the government with regards to a taxpayer's liability. As information gathered to collect excise taxes falls within the prohibition against disclosure in § 6103, *Ryan v. Bureau of Alcohol, Tobacco, and Firearms*, 715 F.2d 644 (D.C.Cir.1983), imposing a duty to disclose in this context would force the government to make a Hobson's choice — either disclose and risk violating § 6103, or refuse to disclose and risk estoppel. We decline to impose such a duty.

[31] Fidelity and the United States vigorously contest whether the ATF's decision to accept company checks from Bay River after it was placed on prepayment status violates 27 *C.F.R.* § 19.519.

[32] As this case does not involve any affirmative misrepresentations by the government to Fidelity, we express no opinion on

Fidelity attempts to avoid the clear mandate of *Hart* and *Fulton Distillery* by relying on a statement made at the end of *Fulton Distillery*. In that statement, this court observed that "we would be faced with a more difficult determination if the Government had failed altogether to act."[33] This musing, though, is merely dictum.[34] As such, it cannot controvert the clear command of the Supreme Court in *Hart* — in which the federal official allegedly permitted the distiller to violate the law[35] — that the government cannot be estopped from collecting on excise tax bonds due to neglect or misconduct by its officials.[36]

We also observe that our refusal to estop the government here works no unfairness on Fidelity. Commercial expectations have been satisfied: Since *Hart* in 1877, sureties have been on notice that they assume the risk of government neglect in the collection of excise taxes. Continuation of *Hart's* "bright line" rule — and rejection of any attempt to engraft a "more difficult case" exception onto this rule —

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this issue. *Cf., Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation, etc.*, 976 F.2d 934, 938 & n. 13 (5th Cir.1992) (noting that governmental action going beyond mere negligence, delay, or inaction may give rise to estoppel).

[33] *Fulton Distillery*, 571 F.2d at 928.

[34] Fidelity vigorously contends that *St. Paul Fire & Marine Ins. Co.* v. *Commodity Credit Corp.*, 646 F.2d 1064 (5th Cir.1981) controls the instant case — presumably as the embodiment of *Fulton Distillery's* "more difficult case" dictum. In *St. Paul* the Commodity Credit Corporation ("CCC") failed to force the principal properly to redeem trust receipts, thereby impairing the collateral of the surety in the cotton represented by those receipts. *Id.* at 1067-73. Adopting general principles of commercial suretyship law, we concluded that the misconduct of the CCC estopped it from collecting on the suretyship bond. *Id.* at 1073-74.

[35] *Hart*, 95 U.S. at 317-18.

[36] The Supreme Court has also given no indication that it wishes to retreat from a narrow approach to estoppel in other contexts. For example, in its most recent case addressing estoppel, *Office of Personnel Management v. Richmond*, 496 U.S. 414, 422, 110 S.Ct. 2465, 2470, 110 L.Ed.2d 387 (1990), the Court observed that it has reversed *every* circuit court finding of estoppel against the government that it has reviewed.

provides certainty to sureties so that they can order their actions accordingly. Under this approach a surety maintains several options to protect itself: For example, the surety may charge a higher fee to compensate for added costs associated with the risk of governmental neglect, or may engage in more active monitoring of the distiller.

III
CONCLUSION

Fidelity and Bay River filled out the 1984 bond in such a way that the 1984 bond is consistent with federal regulations only if it is construed as a unit bond. Consequently, in order to give that bond a definite legal meaning, we must conclude that the 1984 bond was meant to be a unit bond. The 1984 bond thus provides coverage for excise taxes up to its full face amount of $350,000. Although the district court erred in its reasoning on this issue, its judgment imposing $350,000 liability on this bond (less the $100,000 prior payment by Fidelity) is correct.

We also conclude that the district court correctly decided that the government was not estopped from collecting on the 1986 bond. Simply put, the government owes no implied duties to a surety regarding the collection of excise taxes. Consequently, the government cannot be estopped here because it failed to collect excise taxes vigorously or to disclose Bay River's precarious financial condition to Fidelity.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2807

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FIDELITY AND DEPOSIT COMPANY, ETC., ET AL.,

Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING
(February 7, 1994)

Before JOHNSON, WEINER, and DeMOSS, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff,	§	C.A. NO. H-89-2818
VS.	§	
FIDELITY AND DEPOSIT COMPANY	§	
OF MARYLAND AND BAY RIVER	§	
COMPANY, INC.,	§	
Defendants.	§	

ORDER AMENDING SUMMARY JUDGMENT

CAME ON FOR CONSIDERATION, the Motion of FIDELITY AND DEPOSIT COMPANY OF MARYLAND to amend the Summary Judgment entered against it on September 28, 1992, in the instant case and the Court having considered the pleadings and arguments of counsel is of the opinion that the Motion is well taken. It is therefore ORDERED, ADJUDGED AND DECREED that:

The Summary Judgment against Defendant Fidelity and Deposit Company of Maryland entered by this Court on September 28, 1992, is amended to read:

ORDERED, ADJUDGED AND DECREED that Plaintiff United States of America have and recover judgment against Defendant Fidelity and Deposit Company of Maryland in the amount of $850,000.00 pursuant to the terms of the two distilled spirits bonds.

SIGNED this the 27th day of October, 1992.

/s/ MELINDA HARMON

MELINDA HARMON
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION
NO. H-89-2818

UNITED STATES OF AMERICA

Plaintiff,

VS.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, AND BAY RIVER
COMPANY, INC.

Defendant.

MEMORANDUM

The United States of America brought this action against Fidelity and Deposit Company of Maryland ("Fidelity") and Bay River Company, Inc., ("Bay River") to recover amounts due under two distilled spirits bonds for unpaid distilled spirits taxes. Fidelity contests the amount due under the bonds and asserts that the United States should be estopped from any recovery owing to the United States' failure to act. The United States allegedly did not inform Fidelity of Bay River's poor financial standing. Pending before the Court is a Motion for Summary Judgment (Instrument No. 11) submitted by the United States. The United States has also filed a Motion to Dismiss (Instrument No. 22) the Counterclaim for Declaratory Judgment filed by Fidelity. Also pending before the Court is Fidelity's Motion for Summary Judgment (Instrument No. 17). The Court has considered the motions, the responses, and the applicable law, and is of the opinion that the United States' motion for summary judgment should be granted and Fidelity's motion for summary judgment should be denied. The issues raised by Fidelity's

Counterclaim are effectively disposed of by the grant of the United States' motion. All other motions before the Court are moot.

I. STATEMENT OF FACTS

The United States filed suit against Bay River Company, Inc. ("Bay River") seeking approximately 1.6 million dollars for unpaid distilled spirits taxes that had accrued from October 1985, through April 1988. On July 3, 1990, the Court entered a default judgment against Bay River for the unpaid spirits taxes plus interest and statutory additions allowed by law. The Court decreed that Bay River was entitled to credit for any payments made on behalf of Bay River pursuant to any surety bonds. *United States v. Fidelity and Deposit Co. of Maryland,* No. 89-2818 (S.D.Tex. July 3, 1990). There are two surety bonds at issue in this action.

Fidelity issued a bond to Bay River for the face amount of $350,000.00, on October 5, 1984 ("1984 bond"), and on November 17, 1986, Fidelity issued a strengthening bond ("1986 bond") in favor of Bay River for an additional $600,000.00. Pl.'s Motion for Summ. J. Exhibits A and B. The United States now seeks to recover from Fidelity the amounts under the bonds issued by Fidelity to secure the obligations of Bay River to the United States.

As noted below, a surety's liability for withdrawals may be limited by the terms of the bond. Fidelity has paid the United States $100,000.00, under the terms of the Original Bond but argues that the express terms of the 1984 bond allow for no further withdrawal liability.

The face of the 1984 distilled spirits bond is illuminating. The top right portion of the bond contains printed instructions to "Check applicable boxes." Under "1. OPERATIONS" no mark is apparent. A mark of "x" appears to the left of the printed instructions for "2. WITHDRAWAL BOND" and "3. UNIT BOND." In a large block imprinted "AMOUNT OF BOND" the amount of "$350,000" is typed. On the reverse side of the bond are four columns with the headings from left to right reading,

"NAME AND ADDRESS," "REGISTRY NUMBER," "OPERATION COVERAGE," and "WITHDRAWAL COVERAGE." In the operation coverage column "Warehousing and Processor" is typed, after which there appears the amount of $250,000.00." The "amount of coverage" noted at the very end of the operations column is "$250,000.00" and the amount for withdrawal coverage is "$100,000.00."

Fidelity argues that the terms of the 1984 bond clearly demonstrate that its withdrawal liability under that bond is limited to $100,000.00. The United States maintains that the full amount of the bond, $350,000.00, can be used as withdrawal coverage since the 1984 bond was clearly not an operations bond, because "OPERATIONS" had not been marked, but is both a withdrawal and unit bond.[1] Therefore, while $100,000.00 was clearly earmarked for withdrawal liability, the remaining $250,000.00 that appeared in as "OPERATION COVERAGE" section was in fact part of the unit bond coverage that could be applied to withdrawal liability.

Fidelity's defense to 1986 bond hinges on a different theory. Fidelity contends that the United States should be estopped from collecting on the 1986 bond because the government was aware that; (1) Bay River had continually experienced difficulty in complying with government regulations, (2) did not inform Fidelity of the violations, (3) make demand under the 1984 bond, or (4) take any action to collect the taxes. The United States responds noting that Fidelity cannot assert an entitlement to estoppel when Fidelity never contacted the government in evaluating the feasibility of issuing the 1986 bond and merely relied on the representations of Bay River and its President. Pl.'s Motion for Summ. J. at Ex. C., Interrogatories Nos. 8-10, and 18-20.

II. DISCUSSION

A. Summary Judgment Standard

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[1] A unit bond can cover both operations and withdrawal liability. 26 U.S.C. § 5173(d).

Rule 56(c) provides that "[summary] judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Williams v. Adams*, 836 F.2d 958, 960 (5th Cir. 1988). The burden is not on the movant to produce evidence showing the absence of a genuine issue of material fact. *See International Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co.*, 812 F.2d 219, 222 (5th Cir. 1987). A defendant who moves for summary judgment may rely on the absence of evidence to support an essential element of the plaintiff's case *Id.*

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *See Celotex*, 477 U.S. at 324-25. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). Assertions unsupported by facts are insufficient to oppose a motion for summary judgment. *Williams v. Weber Management Serv.*, 839 F.2d 1039, 1041 (5th Cir. 1987). There must be evidence giving rise to reasonable inferences that support the non-moving party's position. *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987). Bare or mere allegations are insufficient. *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 79 (5th Cir. 1987).

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. *Anderson*, 477 U.S. at 254. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 254. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is inappropriate if the evidence before the court, viewed as a whole, could lead to different factual findings and conclusions. *Honore v. Douglas*, 833 F.2d 565, 567 (5th Cir. 1987).

B. The Applicable Law

1. The 1984 Bond

Fidelity argues that it is not liable under the 1984 bond having already tendered the full amount of the withdrawal coverage to the United States. The United States argues that the 1984 bond was also a unit bond allowing for an additional $250,000.00 used for operations coverage to be used for withdrawal coverage. Fidelity counters by noting that on the reverse side of the 1984 bond "$100,000.00" appears in the withdrawal coverage column and thus its liability is limited to that amount. The applicable bond statute reads in part:

> (a) Operations at, and withdrawals from, distilled spirits plant must be covered by bond. —
>
> > (1) Operations. — No person intending to establish a distilled spirits plant may commence operations at such plant unless such person has furnished bond covering operations at such plant.
> >
> > (2) Withdrawals. — No distilled spirits (other than distilled spirits withdrawn under section 5214 or 7510) may be withdrawn from bonded premises except on payment of tax unless the proprietor of the bonded premises has furnished bond covering such withdrawal.

(d) Unit Bonds. — Under regulations prescribed by the Secretary, the requirements of paragraphs (1) and (2) of subsection (a) shall be treated as met by a unit bond which covers both operations at, and withdrawals from, 1 or more bonded premises which could be covered by the same operations bond under subsection (b).

26 U.S.C. § 5173(a)1, (a)2 and (d).

A unit bond may be used for plant operations and/or withdrawal coverage. 26 U.S.C. § 5173(d); *see U.S. v. Reliance Ins. Co.*, No. 86-7028, 1987 WL 16307 (E.D.Pa. August 23, 1987), *aff'd*, 845 F.2d 1018 (3rd Cir. April 21, 1988) (table).

Fidelity relies heavily on *U.S. v. Reliance Ins. Co.*, for the proposition that where the reverse side of the bond contains figures in both the operations and withdrawal coverage categories those figures do not demonstrate the existence of a unit bond, but merely demonstrate the existence of two distinct bonds and the liability for each is limited to the amounts listed. Fidelity asserts that the reverse side of the bond clearly states the coverage for each category. In reality *Reliance* has a much narrower holding and squarely supports a ruling in the governments favor.

In *Reliance* the government sued a surety for the excise tax obligations of a bankrupt distiller. The issue before the *Reliance* court was whether the surety bond was a unit bond capable of covering both operations and withdrawals. There the face of the bond noted that it was an operations bond and a withdrawal bond; the Court later ruled that although the box denoting unit bond coverage was also marked it was clearly a falsification since the box was marked with a different typestyle. The Court then deduced that since the bond was not a unit bond it was merely two distinct bonds, one for operations and one for withdrawals. The amount of coverage for each component was obvious from the reverse side of the bond.

In the case at hand the bond is clearly marked, it is both a withdrawal and unit bond. There has been no allegation that

the 1984 bond has been tampered with. The total amount of the bond is $350,000.00. On the reverse side the bond indicates that there is $100,000.00 for withdrawal coverage. On the front side of the bond, however, the "OPERATIONS" box is not marked. The bond is clearly not an operations bond. The "UNIT BOND" box is marked with an "x" indicating that some $250,000.00 is allocated as a unit bond that allows for operation and/or withdrawal coverage. On the reverse side the bond indicates that there is $250,000.00 for operations coverage. The Court must enforce the instrument as written.

A surety may only arise out of an express contract. *A/S Hydraulico Works v. Fort Worth and Denver Railway Co.*, 483 F.Supp. 518, 521 (S.D. Tex. 1980). "The courts will enforce an unambiguous instrument as written; and in an ordinary case, the writing alone will be deemed to express the intention of the parties." *Sun Oil Company (Delaware) v. Madeley*, 626 S.W.2d 726, 728 (Tex. 1981). *See also Cherokee Water Company v. Forderhause*, 641 S.W.2d 522 (Tex. 1982); *Aetna Life and Casualty Company v. Gunn*, 628 S.W.2d 758 (Tex. 1982).

If an instrument has certain and definite meaning then it is not ambiguous and the Court must construe it according to its terms. *Coker v. Coker*, 650 S.W.2d 391 (Tex. 1983). This Court must ascertain the true intentions of the parties as expressed in the instrument. *Id.*

The admission of explanatory extrinsic evidence depends on whether the court finds as a matter of law that a written instrument is ambiguous. *Isbell v. Williams*, 738 S.W.2d 20, 24 (Tex. App. — Texarkana 1987, writ ref'd n.r.e.); *Reilly v. Rangers Management, Inc.*, 727 S.W.2d 527, 527 (Tex. 1987); *O'Shea v. Coronado Transmission Co.*, 656 S.W.2d 557, 561 (Tex.App. — Corpus Christi 1983, writ ref'd n.r.e.).

The interpretation of an instrument becomes a fact issue for the jury only when, after application of the pertinent rules of construction, there remains a genuine uncertainty as to which of two meanings is proper. *Harris v. Rowe*, 593

S.W.2d 303, 306 (Tex. 1979). This is so as Texas courts have repeatedly declared that the question of whether an instrument is ambiguous is one of law for determination by the court. *See e.g., R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518-19 (Tex. 1980); *Coker v. Coker*, at 394.

There are other meanings of ambiguity. An instrument may be ambiguous if its meaning is "uncertain and doubtful." *Skyland Developers v. Sky Harbor Associates*, 586 S.W.2d 564, 568 (Tex.Civ.App. — Corpus Christi 1979, no writ); *Walter E. Heller & Co. v. Allen*, 412 S.W.2d 712, 718 (Tex.Civ.App. — Corpus Christi 1967, writ ref'd n.r.e.) (guarantor liability). A written instrument may be ambiguous if it is "difficult to comprehend or distinguish, [or] of doubtful import," as there is "doubt as to [its] true meaning." *See San Antonio Life Insurance Co. v. Griffith*, 185 S.W. 335 (Tex.Civ.App. — Fort Worth 1916, no writ); *O'Shea v. Coronado Transmission Co.*, 656 S.W.2d at 561; *see also Goff v. Southmost Sav. & Loan Ass'n*, 758 S.W.2d 822, 825 (Tex, App. — Corpus Christi 1988. writ denied).

The principal purpose of construction is to ascertain the intentions of the parties. Therefore, instruments must be construed from a "utilitarian standpoint bearing in mind the particular business activity sought to be served..." *Neece v. A.A.A. Realty Co.*, 322 S.W.2d 597, 602 (Tex. 1959); *see also Skyland Developers v. Sky Harbor Associates*, 586 S.W.2d at 570.

Courts must give effect to the objective, not subjective, intent of the parties as it is expressed in writing, as that intent control the instrument's construction. *Westwind Exploration, Inc. v. Homestate Sav. Ass'n*, 696 S.W.2d 378, 382 (Tex. 1985) (contract).

This Court must harmonize and give effect to ***all the provisions of the instrument*** *so that none of the writing will be meaningless. Chapman v. Orange Rice Milling Co.*, 747 F.2d 981, 983 (5th Cir. 1984); *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 158 (Tex. 1951). If the provisions in the instrument appear to conflict, they should be adapted

to reflect the true intentions of the parties. *Ogden v. Dickenson State Bank*, 662 S.W.2d 330, 332 (Tex. 1983). This Court must give weight to each portion of the instrument unless there is an irreconcilable conflict. *Id.* Moreover, no single provision taken alone will be given controlling effect; rather, all provisions must be considered with reference to the whole instrument. *Coker v. Coker*, 650 S.W.2d at 393; *Bush v. Brunswick Corp.*, 783 S.W.2d 724, 728 (Tex. App. — Fort Worth 1989, writ denied.

To adopt Fidelity's argument that the bond is both a operations and withdrawal bond would vitiate the intent of the parties expressed on the face of the instrument. "UNIT BOND" was clearly marked. Since a unit bond can be used for both operations and withdrawal liability, the $250,000.00 can be used to secure the payment of tax obligations in this instance. Although the 1984 bond noted that operations coverage was $250,000.00, that coverage was secured by a unit bond for that amount. Inasmuch as it is undisputed that a unit bond may cover both operations and withdrawals the $250,000.00 unit bond initially designated for operations may also cover withdrawals. Fidelity is liable to the United States for $250,000.00 under the 1984 bond.

2. The 1986 Bond — The Defense of Estoppel

Fidelity asserts that the 1986 bond it issued should be void *ab initio* for the Bureau of Alcohol, Tobacco & Firearm's ("ATF") failure to disclose facts material to Fidelity's issuance of the strengthening bond. Fidelity asserts that ATF was aware that Bay River, among other things; (1) wrote checks that were returned for lack of sufficient funds, (2) was insolvent, and (3) was continuously in violation of federal statutes and regulations.

Equitable estoppel may be imposed against the government only in the most egregious situations. *See Heckler v. Community Health Services, Inc. of Crawford County*, 467 U.S. 51, 60-61 & 60 n.12 (1984). Statutes and regulations which are designed to direct government officers in the performance of their duties for the government's own protection do not create any obligation to the surety on the

bond. *United States v. Federal Ins. Co.*, 805 F.2d 1012, 1014 (Fed. Dir. 1986), *cert. denied*, 481 U.S. 1048 (1987); *see also United States v. Fulton Distillery, Inc.*, 571 F.2d 923, 928 (5th Cir. 1978).

"[O]nly by express agreement or statute can the Government assume the consequences of the neglect of its employees." *United States v. Fulton Distillery, Inc.*, 571 F.2d at 927 (footnote omitted). In *Fulton Distillery*, the Fifth Circuit found that the surety assumed the risk of the effect of negligent governmental conduct. 571 F.2d at 927 (quoting *Hart v. United States*, 95 U.S. 316, 319 (1877)). Additionally, the Court there found that "nothing in the legislative history of or the regulations accompanying the relevant statutory provisions suggests that Congress intended to reallocate risks . . . ." *Id.* at 928.

"The Government's neglect could not have constituted an act which increased the surety's risk and discharged [Fidelity] because the risk of neglect had already been allocated to the surety . . . ." *Id.* The Government owes no duty to a surety for its neglect in this instance.

Fidelity relies on dicta at the end of *Fulton Distillery*, for the proposition that where the government failed to act altogether there exists an egregious circumstance requiring estoppel. *United States v. Fulton Distillery, Inc.*, 571 F.2d at 928. It remains uncontroverted, however, that Fidelity did not communicate with the government while evaluating the feasibility of issuing the 1986 bond. Pl.'s Motion for Summ. J. Ex. C, Interrogatory No. 19 ("Identify all communications, written or oral, that defendant had with any representative of the Federal Government concerning Bay River Company, Inc.'s financial situation and/or suitability for a discharge bond, setting forth the time the communication took place, the parties thereto and the subject matter thereof. ANSWER: None." *Id.*) Under the seminal case on which Fidelity relies, *St. Paul Fire & Marine Ins. Co. v. Commodity Credit Corp.*, 646 F.2d 1064 (5th Cir. 1981), "if a surety fails to seek important information that is available to him, he cannot, in the absence of fraud, assert as a defense

ignorance of the facts which he should have known prior to the execution of the contract." 646 F.2d at 1072 (emphasis omitted). The United States asserts that had Fidelity investigated the information readily available to it it could have easily discerned Bay River's financial status. Yet, under *St. Paul Fire & Marine Ins. Co. v. Commodity Credit Corp.*, estoppel may still attach when the surety fails to investigate. 646 F.2d at 1070 n.5. There, the Fifth Circuit refused to charge St. Paul with discovery of the true state of affairs of industry custom even where no representative from the bonding companies approached the government directly for information. 646 F.2d at 1070-74.

However, unlike *St. Paul Fire & Marine Ins. Co. v. Commodity Credit Corp.*, "a surety has been on notice for 100 years that he assumes the risk of negligent governmental conduct" under the excise tax statutes. *United States v. Fulton Distillery, Inc.*, 571 F.2d at 927.

Additionally, *St. Paul*, can be distinguished as it pertains to the role of a surety with respect to Commodity Credit Corporation-sponsored loans and not to the relatively "explicit" area of law that guards the collection of government excise taxes. *see generally United States v. Fulton Distillery, Inc.*, 571 F.2d at 927. Fidelity is liable under the terms of the 1986 bond, the defense of estoppel will not lie in this instance.

III. CONCLUSION

This Court, having considered all other contentions presented, concludes, for the reasons set forth above, that Fidelity's motion for summary judgment should be denied and the United States' motion for summary judgment should be granted. The relief sought in Fidelity's counterclaim for Declaratory Judgment and Rescission has been resolved in favor of the United States. Fidelity is liable for $250,000.00 under the terms of the 1984 bond and for $600,000.00 under the terms of the 1986 bond.

SIGNED at Houston, Texas, this 25th day of September, 1992.

/s/ MELINDA HARMON

MELINDA HARMON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, *Plaintiff*	§	
v.	§	
FIDELITY AND DEPOSIT COMPANY OF MARYLAND AND BAY RIVER COMPANY, INC., *Defendants*	§	Civil No. H-89-2818

SUMMARY JUDGMENT AGAINST DEFENDANT FIDELITY AND DEPOSIT COMPANY OF MARYLAND

The plaintiff, United States of America, has moved this Court to enter summary judgment in the amount of $850,000.00 against Defendant Fidelity and Deposit Company of Maryland ($950,000.00 pursuant to liability on two surety bonds, less $100,000.00 credit for an amount previously collected from Fidelity and Deposit Company of Maryland under one of the two surety bonds). Based on the United States' motion and its attached Declaration and Supporting Memorandum, this Court is of the opinion that the said Motion for Summary Judgment should be granted. It is, therefore,

ORDERED, ADJUDGED and DECREED that plaintiff, United States of America, have and recover judgment against Defendant Fidelity and Deposit Company of Maryland in the amount of $850,000.00, for unpaid distilled spirits taxes.

All parties are ORDERED to pay their own costs and attorney's fees.

DONE this 25th day of September, 1990.

/s/ MELINDA HARMON
United States District Judge

APPENDIX E

26 U.S.C. § 5173. Bonds.

(a) Operations at, and withdrawals from, distilled spirits plan must be covered by bond. —

(1) Operations. — No person intending to establish a distilled spirits plant may commence operations at such plant unless such person has furnished bond covering operations at such plant.

(2) Withdrawals. — No distilled spirits (other than distilled spirits withdrawn under Section 5214 or 7510) may be withdrawn from bonded premises except on payment of tax unless the proprietor of the bonded premises has furnished bond covering such withdrawal.

(b) Operations bonds. — The bond required by paragraph (1) of subsection (a) shall meet the requirements of paragraph (1), (2), or (3) of this subsection:

(1) One plant bond. — The bond covers operations at a single distilled spirits plant.

(2) Adjacent wine cellar bond. — The bond covers operations at a distilled spirits plant and at an adjacent bonded wine cellar.

(3) Area bond. — The bond covers operations at 2 or more distilled spirits plants (and adjacent bonded wine cellars) which —

(A) — are located in the same geographical area (as designated in regulations prescribed by the Secretary), and

(B) — are operated by the same person (or, in the case of a corporation, by such corporation and its controlled subsidiaries).

(c) Withdrawal bonds. — The bond required by paragraph (2) of subsection (a) shall cover withdrawals from 1 or more bonded premises the operations at which could be covered by the same operations bond under subsection (b).

(d) Unit bonds. — Under regulations prescribed by the Secretary, the requirements of paragraphs (1) and (2) of

subsection (a) shall be treated as met by a unit bond which covers both operations at, and withdrawals from, 1 or more bonded premises which could be covered by the same operations bond under subsection (b).

(e) Terms and conditions. —

(1) In general. — Any bond furnished under this section shall be conditioned that the person furnishing the bond —

(A) will faithfully comply with all provisions of law and regulations relating to the activities covered by such bond, and

(B) will pay —

(i) all taxes imposed by this chapter, and

(ii) all penalties incurred by, or fines imposed on, such person for violation of any such provision.

(2) Other terms and conditions. — Any bond furnished under this section shall contain such other terms and conditions as may be required by regulations prescribed by the Secretary.

(f) Amount —

(1) In general. — The penal sum of any bond shall be the amount determined under regulations prescribed by the Secretary.

(2) Maximum and minimum amount. — The Secretary shall by regulations prescribe a minimum amount and a maximum amount for each type of bond which may be furnished under this section.

(g) Total amount available — The total amount of any bond furnished under this section shall be available for the satisfaction of any liability incurred under the terms and conditions of such bond.

(h) Special rules. — For purposes of this section —

(1) **Withdrawal bonds.** — In the case of any bond furnished under this section which covers withdrawals but not operations —

(A) such bond shall be in addition to the operations bond, and

(b) if distilled spirits are withdrawn under such bond, the operations bond shall no longer cover liability for payment of the tax on the spirits withdrawn

(2) **Adjacent wine cellars.** —

(A) **Requirements.** — No wine cellar shall be treated as being adjacent to a distilled spirits plant unless —

(i) such distilled spirits plant is qualified under this subchapter for the production of distilled spirits, and

(ii) such wine cellar and the distilled spirits plant are operated by the same person (or, in the case of a corporation, by such corporation and its controlled subsidiaries).

(B) **Bond in lieu of wine cellar bond.** — In the case of any adjacent wine cellar, a bond furnished under this section which covers operations at such wine cellar shall be in lieu of any bond which would otherwise be required under section 5354 with respect to such wine cellar (other than supplemental bonds required under the second sentence of section 5354).

26 U.S.C. § 6103. Confidentiality and disclosure of returns and return information.

(a) General rule. — Returns and return information shall be confidential, and except as authorized by this title —

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

(b) Definitions. — For purposes of this section —

(1) Return. — The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) Return information. — The term "return information" means —

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is

being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110, but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

(3) **Taxpayer return information.** — The term "taxpayer return information" means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates.

(4) **Tax administration.** — The term "tax administration" —

(A) means —

(i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and

(ii) the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and

(B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.

(5) State. — The term "State" means —

(A) any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and

(B) for purposes of subsections (a)(2), (b)(4), (d)(1), (h)(4), and (p) any municipality —

(i) with a population in excess of 250,000 (as determined under the most recent decennial United States census data available),

(ii) which imposes a tax on income or wages, and

(iii) with which the Secretary (in his sole discretion) has entered into an agreement regarding disclosure.

(6) Taxpayer identity. — The term "taxpayer identity" means the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof.

(7) Inspection. — The terms "inspected" and "inspection" mean any examination of a return or return information.

(8) Disclosure. — The term "disclosure" means the making known to any person in any manner whatever a return or return information.

(9) Federal agency. — The term "Federal agency" means an agency within the meaning of section 551(1) of title 5, United States Code.

(10) Chief executive officer. — The term "chief executive officer" means, with respect to any municipality, any elected official and the chief official (even if not elected) of such municipality.

(c) Disclosure of returns and return information to designee of taxpayer. — The Secretary may, subject to such requirements and conditions as he may prescribe by regulations, disclose the return of any taxpayer, or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a written request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. However, return information shall not be disclosed to such person or persons if the Secretary determines that such disclosure would seriously impair Federal tax administration.

(d) Disclosure to State tax officials and State and local law enforcement agencies. —

(1) In general. — Returns and return information with respect to taxes imposed by chapters 1, 2, 6, 11, 12, 21, 23, 24, 31, 32, 44, 45, 51, and 52 and subchapter D of chapter 36 shall be open to inspection by, or disclosure to, any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for the administration of State tax laws for the purpose of, and only to the extent necessary in, the administration of such laws, including any procedures with respect to locating any person who may be entitled to a refund. Such inspection shall be permitted, or such disclosure made, only upon written request by the head of such agency, body, or commission, and only to the representatives of such agency, body, or commission designated in such written request as the individuals who are to inspect or to receive the returns or return information on behalf of such agency, body, or commission. Such representatives shall not include any individual who is the chief executive officer of such State or who is neither an

employee or legal representative of such agency, body, or commission nor a person described in subsection (n). However, such return information shall not be disclosed to the extent that the Secretary determines that such disclosure would identify a confidential informant or seriously impair any civil or criminal tax investigation.

(2) Disclosure to State audit agencies. —

(A) In general. — Any returns or return information obtained under paragraph (1) by any State agency, body, or commission may be open to inspection by, or disclosure to, officers and employees of the State audit agency for the purpose of, and only to the extent necessary in, making an audit of the State agency, body, or commission referred to in paragraph (1).

(B) State audit agency. — For purposes of subparagraph (A), the term "State audit agency" means any State agency, body, or commission which is charged under the laws of the State with responsibility of auditing State revenues and programs.

(3) Exception for reimbursement under section 7624. — Nothing in this section shall be construed to prevent the Secretary from disclosing to any State or local law enforcement agency which may receive a payment under section 7624 the amount of the recovered taxes with respect to which such a payment may be made.

(e) Disclosure to persons having material interest. —

(1) In general. — The return of a person shall, upon written request, be open to inspection by or disclosure to —

(A) in case of the return of an individual —

(i) that individual,

(ii) if property transferred by that individual to a trust is sold or exchanged in a transaction described in section 644, the trustee or trustees, jointly or separately, of such trust to the extent necessary to ascertain any amount of tax imposed upon the trust by section 644,

(iii) the spouse of that individual if the individual and such spouse have signified their consent to consider a gift reported on such return as made one-half by him and one-half by the spouse pursuant to the provisions of section 2513; or

(iv) the child of that individual (or such child's legal representative) to the extent necessary to comply with the provisions of section 1(i) or 59(j);

(B) in the case of an income tax return filed jointly, either of the individuals with respect to whom the return is filed;

(C) in the case of the return of a partnership, any person who was a member of such partnership during any part of the period covered by the return;

(D) in the case of the return of a corporation or a subsidiary thereof —

(i) any person designated by resolution of its board of directors or other similar governing body,

(ii) any officer or employee of such corporation upon written request signed by any principal officer and attested to by the secretary or other officer,

(iii) any bona fide shareholder of record owning 1 percent or more of the outstanding stock of such corporation,

(iv) if the corporation was a foreign personal holding company, as defined by section 552, any person who was a shareholder during any part of a period covered by such return if with respect to that period, or any part thereof, such shareholder was required under section 551 to include in his gross income undistributed foreign personal holding company income of such company,

(v) if the corporation was electing small business corporation under subchapter S of chapter 1, any person who was a shareholder during any part of the period covered by such return during which an election was in effect, or

(vi) if the corporation has been dissolved, any person authorized by applicable State law to act for the corporation or any person who the Secretary finds to have a material interest which will be affected by information contained therein;

(E) in the case of the return of an estate —

(i) the administrator, executor, or trustee of such estate, and

(ii) any heir at law, next of kin, or beneficiary under the will, of the decedent, but only if the Secretary finds that such heir at law, next of kin, or beneficiary has a material interest which will be affected by information contained therein; and

(F) in the case of the return of a trust —

(i) the trustee of trustees, jointly or separately, and

(ii) any beneficiary of such trust, but only if the Secretary finds that such beneficiary has a material interest which will be affected by information contained therein.

(2) Incompetency. — If an individual described in paragraph (1) is legally incompetent, the applicable return shall, upon written request, be open to inspection by or disclosure to the committee, trustee, or guardian of his estate.

(3) Deceased individuals. — The return of a decedent shall, upon written request, be open to inspection by or disclosure to —

(A) the administrator, executor, or trustee of his estate, and

(B) any heir at law, next of kin, or beneficiary under the will, of such decedent, or a donee of property, but only if the Secretary finds that such heir at law, next of kin, beneficiary, or donee has a material interest which will be affected by information contained therein.

(4) Title 11 cases and receivership proceedings. — If —

(A) there is a trustee in a title 11 case in which the debtor is the person with respect to whom the return is filed, or

(B) substantially all of the property of the person with respect to whom the return is filed is in the hands of a receiver,

such return or returns for prior years of such person shall, upon written request, be open to inspection by or disclosure to such trustee or receiver, but only if the Secretary finds that such trustee or receiver, in his fiduciary capacity, has a material interest which will be affected by information contained therein.

(5) **Individual's title 11 case.** —

(A) **In general.** — In any case to which section 1398 applies (determined without regard to section 1398(b)(1)), any return of the debtor for the taxable year in which the case commenced or any preceding taxable year shall, upon written request, be open to inspection by or disclosure to the trustee in such case.

(B) **Return of estate available to debtor.** — Any return of an estate in a case to which section 1398 applies shall, upon written request, be open to inspection by or disclosure to the debtor in such case.

(C) **Special rule for involuntary cases.** — In an involuntary case, no disclosure shall be made under subparagraph (A) until the order for relief has been entered by the court having jurisdiction of such case unless such court finds that such disclosure is appropriate for purposes of determining whether an order for relief should be entered.

(6) **Attorney in fact.** — Any return to which this subsection applies shall, upon written request, also be open to inspection by or disclosure to the attorney in fact duly authorized in writing by any of the persons described in paragraph (1), (2), (3), (4), or (5) to inspect the return or receive the information on his behalf, subject to the conditions provided in such paragraphs.

(7) **Return information.** — Return information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration.

(f) **Disclosure to Committees of Congress.** —

(1) **Committee on Ways and Means, Committee on Finance, and Joint Committee on Taxation.** — Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives, the chairman of the Committee on Finance of the Senate, or the chairman of the Joint Committee on Taxation, the Secretary shall furnish such committee with any return or return information specified in such request, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(2) **Chief of Staff of Joint Committee on Taxation.** — Upon written request by the Chief of Staff of the Joint Committee on Taxation, the Secretary shall furnish him with any return or return information specified in such request. Such Chief of Staff may submit such return or return information to any committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(3) **Other committees.** — Pursuant to an action by, and upon written request by the chairman of, a committee of the Senate or the House of Representatives (other than a committee specified in paragraph (1)) specially authorized to inspect any return or return information by a resolution of the Senate or the House of Representatives or, in the

case of a joint committee (other than the joint committee specified in paragraph (1)) by concurrent resolution, the Secretary shall furnish such committee, or a duly authorized and designated subcommittee thereof, sitting in closed executive session, with any return or return information which such resolution authorizes the committee or subcommittee to inspect. Any resolution described in this paragraph shall specify the purpose for which the return or return information is to be furnished and that such information cannot reasonably be obtained from any other source.

(4) Agents of committees and submission of information to Senate or House of Representatives. —

(A) Committees described in paragraph (1). — Any committee described in paragraph (1) or the Chief of Staff of the Joint Committee on Taxation shall have the authority, acting directly, or by or through such examiners or agents as the chairman of such committee or such chief of staff may designate or appoint, to inspect returns and return information at such time and in such manner as may be determined by such chairman or chief of staff. Any return or return information obtained by or on behalf of such committee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both. The Joint Committee on Taxation may also submit such return or return information to any other committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(B) Other committees. — Any committee or subcommittee described in paragraph (3) shall have the right, acting directly, or by or through no more than four examiners or agents, designated or appointed in

writing in equal numbers by the chairman and ranking minority member of such committee or subcommittee, to inspect returns and return information at such time and in such manner as may be determined by such chairman and ranking minority member. Any return or return information obtained by or on behalf of such committee or subcommittee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, shall be furnished to the Senate or the House of Representatives only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(g) Disclosure to President and certain other persons. —

(1) In general. — Upon written request by the President, signed by him personally, the Secretary shall furnish to the President, or to such employee or employees of the White House Office as the President may designate by name in such request, a return or return information with respect to any taxpayer named in such request. Any such request shall state —

(A) the name and address of the taxpayer whose return or return information is to be disclosed,

(B) the kind of return or return information which is to be disclosed,

(C) the taxable period or periods covered by such return or return information, and

(D) the specific reason why the inspection or disclosure is requested.

(2) Disclosure of return information as to Presidential appointees and certain other Federal Government appointees. — The Secretary may disclose to a duly authorized representative of the Executive Office of the President or to the head of any Federal agency, upon

written request by the President or head of such agency, or to the Federal Bureau of Investigation on behalf of and upon written request by the President or such head, return information with respect to an individual who is designated as being under consideration for appointment to a position in the executive or judicial branch of the Federal Government. Such return information shall be limited to whether such individual —

(A) has filed returns with respect to the taxes imposed under chapter 1 for not more than the immediately preceding 3 years;

(B) has failed to pay any tax within 10 days after notice and demand, or has been assessed any penalty under this title for negligence, in the current year or immediately preceding 3 years;

(C) has been or is under investigation for possible criminal offenses under the internal revenue laws and the results of any such investigation; or

(D) has been assessed any civil penalty under this title for fraud. Within 3 days of the receipt of any request for any return information with respect to any individual under this paragraph, the Secretary shall notify such individual in writing that such information has been requested under the provisions of this paragraph.

(3) **Restriction on disclosure.** — The employees to whom returns and return information are disclosed under this subsection shall not disclose such returns and return information to any other person except the President or the head of such agency without the personal written direction of the President or the head of such agency.

(4) **Restriction on disclosure to certain employees.** — Disclosure of returns and return information under this subsection shall not be made to any employee whose annual rate of basic pay is less than the annual rate of basic pay specified for positions subject to section 5316 of title 5, United States Code.

(5) **Reporting requirements.** — Within 30 days after the close of each calendar quarter, the President and the head of any agency requesting returns and return information under this subsection shall each file a report with the Joint Committee on Taxation setting forth the taxpayers with respect to whom such requests were made during such quarter under this subsection, the returns or return information involved, and the reasons for such requests. The President shall not be required to report on any request for returns and return information pertaining to an individual who was an officer or employee of the executive branch of the Federal Government at the time such request was made. Reports filed pursuant to this paragraph shall not be disclosed unless the Joint Committee on Taxation determines that disclosure thereof (including identifying details) would be in the national interest. Such reports shall be maintained by the Joint Committee on Taxation for a period not exceeding 2 years unless, within such period, the Joint Committee on Taxation determines that a disclosure to the Congress is necessary.

(h) Disclosure to certain Federal officers and employees for purposes of tax administration, etc. —

(1) **Department of the Treasury.** — Returns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes.

(2) **Department of Justice.** — In a matter involving tax administration, a return or return information shall be open to inspection by or disclosure to officers and employees of the Department of Justice (including United States attorneys) personally and directly engaged in, and solely for their use in, any proceeding before a Federal grand jury or preparation for any proceeding (or investigation which may result in such a proceeding) before a

Federal grand jury or any Federal or State court, but only if —

(A) the taxpayer is or may be a party to the proceeding, or the proceeding arose out of, or in connection with determining the taxpayer's civil or criminal liability, or the collection of such civil liability in respect of any tax imposed under this title;

(B) the treatment of an item reflected on such return is or may be related to the resolution of an issue in the proceeding or investigation; or

(C) such return or return information relates or may relate to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer which affects, or may affect, the resolution of an issue in such proceeding or investigation.

(3) **Form of request.** — In any case in which the Secretary is authorized to disclose a return or return information to the Department of Justice pursuant to the provisions of this subsection —

(A) if the Secretary has referred the case to the Department of Justice, or if the proceeding is authorized by subchapter B of chapter 76, the Secretary may make such disclosure on his own motion, or

(B) if the Secretary receives a written request from the Attorney General, the Deputy Attorney General, or an Assistant Attorney General for a return of, or return information relating to, a person named in such request and setting forth the need for the disclosure, the Secretary shall disclose return or return the information so requested.

(4) **Disclosure in judicial and administrative tax proceedings.** — A return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only —

(A) the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or

the collection of such civil liability, in respect of any tax imposed under this title;

(B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding;

(C) if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding; or

(D) to the extent required by order of a court pursuant to section 3500 of title 18, United States Code, or rule 16 of the Federal Rules of Criminal Procedure, such court being authorized in the issuance of such order to give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title.

However, such return or return information shall not be disclosed as provided in subparagraph (A), (B), or (C) if the Secretary determines that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.

(5) Prospective jurors. — In connection with any judicial proceeding described in paragraph (4) to which the United States is a party, the Secretary shall respond to a written inquiry from an attorney of the Department of Justice (including a United States attorney) involved in such proceeding or any person (or his legal representative) who is a party to such proceeding as to whether an individual who is a prospective juror in such proceeding has or has not been the subject of any audit or other tax investigation by the Internal Revenue Service. The Secretary shall limit such response to an affirmative or negative reply to such inquiry.

(6) Withholding of tax from social security benefits. — Upon written request of the payor agency, the Secretary may disclose available return information from the master

files of the Internal Revenue Service with respect to the address and status of an individual as a nonresident alien or as a citizen or resident of the United States to the Social Security Administration or the Railroad Retirement Board (whichever is appropriate) for purposes of carrying out its responsibilities for withholding tax under section 1441 from social security benefits (as defined in section 86(d)).

(i) Disclosure to Federal officers or employees for administration of Federal laws not relating to tax administration. —

(1) Disclosure of returns and return information for use in criminal investigations. —

(A) In general. — Except as provided in paragraph (6), any return or return information with respect to any specified taxable period or periods shall, pursuant to and upon the grant of an ex parte order by a Federal district court judge or magistrate under subparagraph (B), be open (but only to the extent necessary as provided in such order) to inspection by, or disclosure to, officers and employees of any Federal agency who are personally and directly engaged in —

(i) preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated Federal criminal statute (not involving tax administration) to which the United States or such agency is or may be a party,

(ii) any investigation which may result in such a proceeding, or

(iii) any Federal grand jury proceeding pertaining to enforcement of such a criminal statute to which the United States or such agency is or may be a party,

solely for the use of such officers and employees in such preparation, investigation, or grand jury proceeding.

(B) Application for order. — The Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, any United States attorney, any special prosecutor appointed under

section 593 of title 28, United States Code, or any attorney in charge of a criminal division organized crime strike force established pursuant to section 510 of title 28, United States Code, may authorize an application to a Federal district court judge or magistrate for the order referred to in subparagraph (A). Upon such application, such judge or magistrate may grant such order if he determines on the basis of the facts submitted by the applicant that —

(i) there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed,

(ii) there is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act, and

(iii) the return or return information is sought exclusively for use in a Federal criminal investigation or proceeding concerning such act, and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.

(2) Disclosure of return information other than taxpayer return information for use in criminal investigations. —

(A) In general. — Except as provided in paragraph (6), upon receipt by the Secretary of a request which meets the requirements of subparagraph (B) from the head of any Federal agency or the Inspector General thereof, or, in the case of the Department of Justice, the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, any United States attorney, any special prosecutor appointed under section 593 of title 28, United States Code, or any attorney in charge of a criminal division organized crime strike force established pursuant to section 510 of title 28, United States

Code, the Secretary shall disclose return information (other than taxpayer return information) to officers and employees of such agency who are personally and directly engaged in —

(i) preparation for any judicial or administrative proceeding described in paragraph (1)(A)(i),

(ii) any investigation which may result in such a proceeding, or

(iii) any grand jury proceeding described in paragraph (1)(A)(iii), solely for the use of such officers and employees in such preparation, investigation, or grand jury proceeding.

(B) Requirements. — A request meets the requirements of this subparagraph if the request is in writing and sets forth —

(i) the name and address of the taxpayer with respect to whom the requested return information relates;

(ii) the taxable period or periods to which such return information relates;

(iii) the statutory authority under which the proceeding or investigation described in subparagraph (A) is being conducted; and

(iv) the specific reason or reasons why such disclosure is, or may be, relevant to such proceeding or investigation.

(C) Taxpayer identity. — For purposes of this paragraph, a taxpayer's identity shall not be treated as taxpayer return information.

(3) Disclosure of return information to apprise appropriate officials of criminal activities or emergency circumstances. —

(A) Possible violations of Federal criminal law. —

(i) In general. — Except as provided in paragraph (6), the Secretary may disclose in writing return information (other than taxpayer return information)

which may constitute evidence of a violation of any Federal criminal law (not involving tax administration) to the extent necessary to apprise the head of the appropriate Federal agency charged with the responsibility of enforcing such law. The head of such agency may disclose such return information to officers and employees of such agency to the extent necessary to enforce such law.

(ii) Taxpayer identity. — If there is return information (other than taxpayer return information) which may constitute evidence of a violation by any taxpayer of any Federal criminal law (not involving tax administration), such taxpayer's identity may also be disclosed under clause (i).

(B) Emergency circumstances. —

(i) Danger of death or physical injury. — Under circumstances involving an imminent danger of death or physical injury to any individual, the Secretary may disclose return information to the extent necessary to apprise appropriate officers or employees of any Federal or State law enforcement agency of such circumstances.

(ii) Flight from Federal prosecution. — Under circumstances involving the imminent flight of any individual from Federal prosecution, the Secretary may disclose return information to the extent necessary to apprise appropriate officers or employees of any Federal law enforcement agency of such circumstances.

(4) Use of certain disclosed returns and return information in judicial or administrative proceedings. —

(A) Returns and taxpayer return information. —

Except as provided in subparagraph (C), any return or taxpayer return information obtained under paragraph (1) may be disclosed in any judicial or administrative proceeding pertaining to enforcement of a specifically

designated Federal criminal statute or related civil forfeiture (not involving tax administration) to which the United States or a Federal agency is a party —

(i) if the court finds that such return or taxpayer return information is probative of a matter in issue relevant in establishing the commission of a crime or the guilt or liability of a party, or

(ii) to the extent required by order of the court pursuant to section 3500 of title 18, United States Code, or rule 16 of the Federal Rules of Criminal Procedure.

(B) Return information (other than taxpayer return information). — Except as provided in subparagraph (C), any return information (other than taxpayer return information) obtained under paragraph (1), (2), or (3)(A) may be disclosed in any judicial or administrative proceeding pertaining to enforcement of a specifically designated Federal criminal statute or related civil forfeiture (not involving tax administration) to which the United States or a Federal agency is a party.

(C) Confidential informant; impairment of investigations. — No return or return information shall be admitted into evidence under subparagraph (A)(i) or (B) if the Secretary determines and notifies the Attorney General or his delegate or the head of the Federal agency that such admission would identify a confidential informant or seriously impair a civil or criminal tax investigation.

(D) Consideration of confidentiality policy. — In ruling upon the admissibility of returns or return information, and in the issuance of an order under subparagraph (A)(ii), the court shall give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title.

(E) Reversible error. — The admission into evidence of any return or return information contrary to the

provisions of this paragraph shall not, as such, constitute reversible error upon appeal of a judgment in the proceeding.

(5) Disclosure to locate fugitives from justice. —

(A) In general. — Except as provided in paragraph (6), the return of an individual or return information with respect to such individual shall, pursuant to and upon the grant of an ex parte order by a Federal district court judge or magistrate under subparagraph (B), be open (but only to the extent necessary as provided in such order) to inspection by, or disclosure to, officers and employees of any Federal agency exclusively for use in locating such individual.

(B) Application for order. — Any person described in paragraph (1)(B) may authorize an application to a Federal district court judge or magistrate for an order referred to in subparagraph (A). Upon such application, such judge or magistrate may grant such order if he determines on the basis of the facts submitted by the applicant that —

(i) a Federal arrest warrant relating to the commission of a Federal felony offense has been issued for an individual who is a fugitive from justice,

(ii) the return of such individual or return information with respect to such individual is sought exclusively for use in locating such individual, and

(iii) there is reasonable cause to believe that such return or return information may be relevant in determining the location of such individual.

(6) Confidential informants; impairment of investigations. — The Secretary shall not disclose any return or return information under paragraph (1), (2), (3)(A), (5), or (7) if the Secretary determines (and, in the case of a request for disclosure pursuant to a court order described in paragraph (1)(B) or (5)(B), certifies to the court) that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.

(7) **Comptroller General.** —

(A) Returns available for inspection. — Except as provided in subparagraph (C), upon written request by the Comptroller General of the United States, returns and return information shall be open to inspection by, or disclosure to, officers and employees of the General Accounting Office for the purpose of, and to the extent necessary in, making —

(i) an audit of the Internal Revenue Service or the Bureau of Alcohol, Tobacco and Firearms which may be required by section 713 of title 31, United States Code, or

(ii) any audit authorized by subsection (p)(6),

except that no such officer or employee shall, except to the extent authorized by subsection (f) or (p)(6), disclose to any person, other than another officer or employee of such office whose official duties require such disclosure, any return or return information described in section 4424(a) in a form which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, nor shall such officer or employee disclose any other return or return information, except as otherwise expressly provided by law, to any person other than such other officer or employee of such office in a form which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

(B) Audits of other agencies. —

(i) In general. — Nothing in this section shall prohibit any return or return information obtained under this title by any Federal agency (other than an agency referred to in subparagraph (A)) for use in any program or activity from being open to inspection by, or disclosure to, officers and employees of the General Accounting Office if such inspection or disclosure is —

(I) for purposes of, and to the extent necessary in, making an audit authorized by law of such program or activity, and

(II) pursuant to a written request by the Comptroller General of the United States to the head of such Federal agency.

(ii) **Information from Secretary.** — If the Comptroller General of the United States determines that the returns or return information available under clause (i) are not sufficient for purposes of making an audit of any program or activity of a Federal agency (other than an agency referred to in subparagraph (A)), upon written request by the Comptroller General to the Secretary, returns and return information (of the type authorized by subsection (l) or (m) to be made available to the Federal agency for use in such program or activity) shall be open to inspection by, or disclosure to, officers and employees of the General Accounting Office for the purpose of, and to the extent necessary in, making such audit.

(iii) **Requirement of notification upon completion of audit.** — Within 90 days after the completion of an audit with respect to which returns or return information were opened to inspection or disclosed under clause (i) or (ii), the Comptroller General of the United States shall notify in writing the Joint Committee on Taxation of such completion. Such notice shall include —

(I) a description of the use of the returns and return information by the Federal agency involved,

(II) such recommendations with respect to the use of returns and return information by such Federal agency as the Comptroller General deems appropriate, and

(III) a statement on the impact of any such recommendations on confidentiality of returns and

return information and the administration of this title.

(iv) **Certain restrictions made applicable.** — The restrictions contained in subparagraph (A) on the disclosure of any returns or return information open to inspection or disclosed under such subparagraph shall also apply to returns and return information open to inspection or disclosed under this subparagraph.

(C) **Disapproval by Joint Committee on Taxation.** — Returns and return information shall not be open to inspection or disclosed under subparagraph (A) or (B) with respect to an audit —

(i) unless the Comptroller General of the United States notifies in writing the Joint Committee on Taxation of such audit, and

(ii) if the Joint Committee on Taxation disapproves such audit by a vote of at least two-thirds of its members within the 30-day period beginning on the day the Joint Committee on Taxation receives such notice.

(8) **Disclosure of returns filed under section 6050I.** — The Secretary may, upon written request, disclose returns filed under section 6050I to officers and employees of any Federal agency whose official duties require such disclosure for the administration of Federal criminal statutes not related to tax administration.

(j) **Statistical use.** —

(1) **Department of Commerce.** — Upon request in writing by the Secretary of Commerce, the Secretary shall furnish —

(A) such returns, or return information reflected thereon, to officers and employees of the Bureau of the Census, and

(B) such return information reflected on returns of corporations to officers and employees of the Bureau of Economic Analysis, as the Secretary may prescribe by regulation for the purpose of, but only to the extent

necessary in, the structuring of censuses and national economic accounts and conducting related statistical activities authorized by law.

(2) Federal Trade Commission. — Upon request in writing by the Chairman of the Federal Trade Commission, the Secretary shall furnish such return information reflected on any return of a corporation with respect to the tax imposed by chapter 1 to officers and employees of the Division of Financial Statistics of the Bureau of Economics of such commission as the Secretary may prescribe by regulation for the purpose of, but only to the extent necessary in, administration by such division of legally authorized economic surveys of corporations.

(3) Department of Treasury. — Returns and return information shall be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for the purpose of, but only to the extent necessary in, preparing economic or financial forecasts, projections, analyses, and statistical studies and conducting related activities. Such inspection or disclosure shall be permitted only upon written request which sets forth the specific reason or reasons why such inspection or disclosure is necessary and which is signed by the head of the bureau or office of the Department of the Treasury requesting the inspection or disclosure.

(4) Anonymous form. — No person who receives a return or return information under this subsection shall disclose such return or return information to any person other than the taxpayer to whom it relates except in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

(k) Disclosure of certain returns and return information for tax administration purposes. —

(1) Disclosure of accepted offers-in-compromise. — Return information shall be disclosed to members of the general public to the extent necessary to permit inspection

of any accepted offer-in-compromise under section 7122 relating to the liability for a tax imposed by this title.

(2) Disclosure of amount of outstanding lien. — If a notice of lien has been filed pursuant to section 6323(f), the amount of the outstanding obligation secured by such lien may be disclosed to any person who furnishes satisfactory written evidence that he has a right in the property subject to such lien or intends to obtain a right in such property.

(3) Disclosure of return information to correct misstatements of fact. — The Secretary may, but only following approval by the Joint Committee on Taxation, disclose such return information or any other information with respect to any specific taxpayer to the extent necessary for tax administration purposes to correct a misstatement of fact published or disclosed with respect to such taxpayer's return or any transaction of the taxpayer with the Internal Revenue Service.

(4) Disclosure to competent authority under tax convention. — A return or return information may be disclosed to a competent authority of a foreign government which has an income tax or gift and estate tax convention, or other convention or bilateral agreement relating to the exchange of tax information, with the United States but only to the extent provided in, and subject to the terms and conditions of, such convention or bilateral agreement.

(5) State agencies regulating tax return preparers. — Taxpayer identify information with respect to any income tax return preparer, and information as to whether or not any penalty has been assessed against such income tax return preparer under section 6694, 6695, or 7216, may be furnished to any agency, body, or commission lawfully charged under any State or local law with the licensing, registration, or regulation of income tax return preparers. Such information may be furnished only upon written request by the head of such agency, body, or commission designating the officers or employees to whom such information is to be furnished. Information may be furnished

and used under this paragraph only for purposes of the licensing, registration, or regulation of income tax return preparers.

(6) Disclosure by internal revenue officers and employees for investigative purposes. — An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

(l) Disclosure of returns and return information for purposes other than tax administration. —

(1) Disclosure of certain returns and return information to Social Security Administration and Railroad Retirement Board. — The Secretary may, upon written request, disclose returns and return information with respect to —

(A) taxes imposed by chapters 2, 21, and 24, to the Social Security Administration for purposes of its administration of the Social Security Act;

(B) a plan to which part I of subchapter D of chapter 1 applies, to the Social Security Administration for purposes of carrying out its responsibility under section 1131 of the Social Security Act, limited, however, to return information described in section 6057(d); and

(C) taxes imposed by chapter 22, to the Railroad Retirement Board for purposes of its administration of the Railroad Retirement Act.

(2) Disclosure of returns and return information to the Department of Labor and Pension Benefit Guaranty Corporation. — The Secretary may, upon written request, furnish returns and return information to the proper officers and employees of the Department of Labor and the Pension Benefit Guaranty Corporation for purposes of, but only to the extent necessary, in the administration of titles I and IV of the Employee Retirement Income Security Act of 1974.

(3) Disclosure that applicant for Federal loan has tax delinquent account. —

(A) In general. — Upon written request, the Secretary may disclose to the head of the Federal agency administering any included Federal loan program whether or not an applicant for a loan under such program has a tax delinquent account.

(B) Restriction on disclosure. — Any disclosure under subparagraph (A) shall be made only for the purpose of, and to the extent necessary in, determining the creditworthiness of the applicant for the loan in question.

(C) Included Federal loan program defined. — For purposes of this paragraph, the term "included Federal loan program" means any program —

(i) under which the United States or a Federal agency makes, guarantees, or insures loans, and

(ii) with respect to which there is in effect a determination by the Director of the Office of the Management and Budget (which has been published in the Federal Register) that the application of this paragraph to such program will substantially prevent or reduce future delinquencies under such program.

(4) Disclosure of returns and return information for use in personnel or claimant representative matters. — The Secretary may disclose returns and return information.

(A) upon written request —

(i) to an employee or former employee of the Department of the Treasury, or to the duly authorized legal representative of such employee or former employee, who is or may be a party to any administrative action or proceeding affecting the personnel rights of such employee or former employee; or

(ii) to any person, or to the duly authorized legal representative of such person, whose rights are or may be affected by an administrative action or proceeding under section 330 of the title 31, United States Code,

solely for use in the action or proceeding, or in preparation for the action or proceeding, but only to the extent that the Secretary determines that such returns or return information is or may be relevant and material to the action or proceeding; or

(B) to officers and employees of the Department of the Treasury for use in any action or proceeding described in subparagraph (A), or in preparation for such action or proceeding, to the extent necessary to advance or protect the interests of the United States.

(5) Department of Health and Human Services. — Upon written request by the Secretary of Health and Human Services, the Secretary may disclose information returns filed pursuant to part III of subchapter A of chapter 61 of this subtitle for the purpose of carrying out, in accordance with an agreement entered into pursuant to section 232 of the Social Security Act, an effective return processing program.

(6) Disclosure of return information to Federal, State, and local child support enforcement agencies. —

(A) Return information from Internal Revenue Service. — The Secretary may, upon written request, disclose to the appropriate Federal, State, or local child support enforcement agency —

(i) available return information from the master files of the Internal Revenue Service relating to the social security account number (or numbers, if the

individual involved has more than one such number), address, filing status, amounts and nature of income, and the number of dependents reported on any return filed by, or with respect to, any individual with respect to whom child support obligations are sought to be established or enforced pursuant to the provisions of part D of title IV of the Social Security Act and with respect to any individual to whom such support obligations are owing, and

(ii) available return information reflected on any return filed by, or with respect to, any individual described in clause (i) relating to the amount of such individual's gross income (as defined in section 61) or consisting of the names and addresses or payors of such income and the names of any dependents reported on such return, but only if such return information is not reasonably available from any other source.

(B) Restriction on disclosure. — The Secretary shall disclose return information under subparagraph (A) only for purposes of, and to the extent necessary in, establishing and collecting child support obligations from, and locating, individuals owing such obligations.

(7) Disclosure of return information to Federal, State, and local agencies administering certain programs under the Social Security Act or the Food Stamp Act of 1977. —

(A) Return information from Social Security Administration. — The Commissioner of Social Security shall, upon written request, disclose return information from returns with respect to net earnings from self-employment (as defined in section 1402), wages (as defined in section 3121(a) or 3401(a)), and payments of retirement income, which have been disclosed to the Social Security Administration as provided by paragraph (1) or (5) of this subsection, to any Federal, State, or local agency administering a program listed on subparagraph (D).

(B) Return information from Internal Revenue Service. — The Secretary shall, upon written request, disclose current return information from returns with respect to unearned income from the Internal Revenue Service files to any Federal, State, or local agency administering a program listed in subparagraph (D).

(C) Restriction on disclosure. — The Commissioner of Social Security and the Secretary shall disclose return information under subparagraphs (A) and (B) only for purposes of, and to the extent necessary in, determining eligibility for, or the correct amount of, benefits under a program listed in subparagraph (D).

(D) Programs to which rule applies. — The programs to which this paragraph applies are:

(i) aid to families with dependent children provided under a State plan approved under part A of title IV of the Social Security Act;

(ii) medical assistance provided under a State plan approved under title XIX of the Social Security Act;

(iii) supplemental security income benefits provided under title XVI of the Social Security Act, and federally administered supplementary payments of the type described in section 1616(a) of such Act (including payments pursuant to an agreement entered into under section 212(a) of Public Law 93-66);

(iv) any benefits provided under a State plan approved under title I, X, XIV, or XVI of the Social Security Act (as those titles apply to Puerto Rico, Guam, and the Virgin Islands);

(v) unemployment compensation provided under a State law described in section 3304 of this title;

(vi) assistance provided under the Food Stamp Act of 1977; and

(vii) State-administered supplementary payments of the type described in section 1616(a) of the Social Security Act (including payments pursuant to an

agreement entered into under section 212(a) of Public Law 93-66).

(8) Disclosure of certain return information by Social Security Administration to State and local child support enforcement agencies. —

(A) In general. — Upon written request, the Commissioner of Social Security shall disclose directly to officers and employees of a State or local child support enforcement agency return information from returns with respect to social security account numbers, net earnings from self-employment (as defined in section 1402), wages (as defined in section 3121(a) or 3401(a)), and payments of retirement income which have been disclosed to the Social Security Administration as provided by paragraph (1) or (5) of this subsection.

(B) Restriction on disclosure. — The Commissioner of Social Security shall disclose return information under subparagraph (A) only for purposes of, and to the extent necessary in, establishing and collecting child support obligations from, and locating, individuals owing such obligations. For purposes of the preceding sentence, the term "child support obligations" only includes obligations which are being enforced pursuant to a plan described in section 454 of the Social Security Act which has been approved by the Secretary of Health and Human Services under part D of title IV of such Act.

27 C.F.R. § 19.519 Methods of tax payment.

The tax on spirits shall be paid pursuant to a return on Form 5000.24, filed as provided in § 19.523 or § 19.524 and § 19.525. Except for remittance to be effected by electronic fund transfer under § 19.524, remittance for the tax in full shall accompany the return and may be in any form which the regional director (compliance) is authorized to accept under the provisions of § 70.61 (Payment by check or money order) and which is acceptable to him. However, where a check or money order tendered in payment for taxes is not paid on presentment, or where the taxpayer is otherwise in default in payment, any remittance made during the period of such default, and until the regional director (compliance) finds that the revenue will not be jeopardized by the acceptance of a personal check (if acceptable to the regional director (compliance)), shall be in cash or in the form of a certified, cashier's, or treasurer's check drawn on any bank or trust company incorporated under the laws of the United States, or under the laws of any State, Territory, or possession of the United States, or a money order, as provided in § 70.61. Checks and money orders shall be made payable to "Bureau of Alcohol. Tobacco and Firearms".

(Act of August 16, 1954, Ch. 736, 68A Stat. 777, as amended (26 U.S.C. 6311); sec. 201. Pub. L. 85-859, 72 Stat. 1335, as amended (26 U.S.C. 5061)).

[T.D. ATF-198, 50 FR 8464, Mar. 1, 1985, as amended by T.D. ATF-219, 50 FR 51387, Dec. 17, 1985; T.D. ATF-251, 52 FR 19313, May 22, 1987; T.D. ATF-301, 55 FR 47605, Nov. 14, 1990]

(2)

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No. 93-1787

In the Supreme Court of the United States

OCTOBER TERM, 1994

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, on the facts of this case, the 1986 surety bond that petitioner issued is enforceable by the United States.

2. Whether summary judgment was appropriate in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 10 F.3d 1150. The opinion of the district court (Pet. App. D1-D11) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1994. A petition for rehearing was denied on February 7, 1994 (Pet. App. B1). The petition for a writ of certiorari was filed on May 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States imposes an excise tax on the production of distilled spirits. The operator of a distillery is required to secure the payment of those taxes with surety bonds. The tax attaches to the production of the spirits and is to be paid before the spirits may be removed from the plant. 26 U.S.C. 5001(b), 5213. In some circumstances, however, the taxes may be paid on semi-monthly returns instead of on each shipment separately.

The proprietor of a distilled spirits plant is required to obtain an "operations bond" prior to commencing operations. 26 U.S.C. 5173(a)(1). The operations bond secures taxes on all distilled spirits located at the distillery and on all distilled spirits improperly removed from the distillery's premises. 26 U.S.C. 5005(c). Distilled spirits may not be removed from the bonded distillery premises except upon prepayment of the distilled spirits excise tax unless the proprietor has obtained a "withdrawal bond." 26 U.S.C. 5173(a)(2). The withdrawal bond allows the proprietor to defer payment of the taxes until the due date of the semi-monthly return. The proprietor also has the option of obtaining a "unit bond," which provides coverage for both operations and withdrawal activities. 26 U.S.C. 5173(d). When a unit bond is chosen, the total amount of a unit bond is available for satisfaction of any distilled spirits tax liability, whether based on operations or on withdrawals. 26 U.S.C. 5173(g). If production or withdrawals for any period exceed bond coverage, the distillery may obtain a "strengthening bond" from the surety to increase the coverage. 27 C.F.R. 19.245, 19.246. During the period relevant to this case, the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (ATF) regulated the operations of distilleries and, in conjunction

with the Internal Revenue Service, monitored their tax returns and tax payments.

2. Petitioner is a commercial bonding company. In October 1984, petitioner issued a distilled spirits bond to secure the federal excise tax obligations of Bay River, a distilled spirits bottler. On the front of the bond form, indicating the "type of bond as prescribed under 26 U.S.C. 5173," the boxes for "Withdrawal bond" and "Unit bond" were checked. The "operations bond" box was not checked. In the block imprinted "Amount of bond," the amount "$350,000" was typed. On the reverse side of the bond form, a line was filled out indicating that Bay River Company had operations coverage in the amount of $250,000 and withdrawal coverage in the amount of $100,000 (Pet. App. A3-A4, D2-D3; Appellant's Record Excerpts, Tab 6). That coverage allocation is consistent with the requirements for a unit bond. 27 C.F.R. 19.244.

Bay River began operations in November 1984. Regular ATF audits began in April 1986. The first two audit reports indicated that Bay River had poor internal controls and cash flow problems but that its proprietor was cooperating and was trying to make improvements. Each report recommended close scrutiny of Bay River's operations and tax returns (Pet. App. A4).

Two checks for January 1986 excise taxes were returned to the Internal Revenue Service (IRS) unpaid. In February 1986, ATF notified Bay River pursuant to 27 C.F.R. 19.519 (1986) that its taxes would have to be prepaid before spirits could be removed from the premises. By October 1986, ten more checks issued by Bay River were returned to the IRS unpaid. The ATF therefore notified Bay River that its tax prepayments must be made by cash, cashier's check, treasurer's check, or money order (Pet. App. A4).

3. In November 1986, petitioner issued a strengthening bond obligating itself for an additional $600,000 for withdrawal coverage in the event of any default by Bay River in payments of excise tax. In deciding to issue the strengthening bond, petitioner concluded that the bond would be written "on a full collateral basis" (Appellant's Record Excerpts, Tab 8 at 17). As security for the strengthening bond, petitioner obtained indemnification agreements from Stephen Fuller (president of Bay River) and letters of credit issued by American Bank and confirmed by Texas Commerce Bank (*id.* at 14). Petitioner did not contact the United States or its representatives concerning Bay River's financial situation. Instead, petitioner "relied on financial statements furnished by Bay River, which later proved to be inaccurate" (Pet. App. A4-A5).

Eighteen months later, after two more checks from Bay River were returned unpaid, and after a return was filed without an accompanying tax payment, ATF made demand on both Bay River and petitioner for unpaid excise taxes. Petitioner paid $100,000 pursuant to the original 1984 bond but denied further liability. Petitioner claimed that the document constituted two bonds: an operations bond of $250,000 and a withdrawal bond of $100,000. Petitioner asserted that its liability was limited to the withdrawal coverage of $100,000. With respect to the 1986 strengthening bond, petitioner claimed that the United States was estopped from enforcing it because ATF had not volunteered information to petitioner concerning Bay River's financial difficulties before petitioner issued the bond (Pet. App. A5 & n.2).

4. The United States then commenced this action against Bay River and petitioner. A default judgment was entered against Bay River for the unpaid distilled

spirits taxes. The district court also entered summary judgment against petitioner for the amounts of its surety bonds. The court concluded that the original 1984 bond was both a unit bond in the amount of $250,000 and a withdrawal bond in the amount of $100,000. Since the full amount of a unit bond is available for withdrawal liabilities, the court held that petitioner was liable to the government for the full $350,000 amount of the original 1984 bond (Pet. App. A5-A6, D5-D9).

With respect to the 1986 strengthening bond, the district court concluded that, since petitioner had relied on other assurances and had never requested any financial information from the government, the government's silence with respect to the financial difficulties of Bay River did not constitute a basis for an estoppel. The court held that, under the express terms of the strengthening bond, petitioner was liable to the United States in the amount of $600,000 (Pet. App. A6, D9-D12).

5. The court of appeals affirmed (Pet. App. A1-A13). The court concluded that the original 1984 bond was not a unit bond in the amount of $250,000 and a withdrawal bond in the amount of $100,000 but was instead a unit bond in the amount of $350,000. The court held that, reading the instrument as a whole, the box marked "withdrawal bond" on the surety form was surplusage (Pet. App. A8). The court of appeals therefore concluded that petitioner was liable for $350,000 for the original 1984 bond, less the $100,000 previously paid (Pet. App. A9).

With respect to the 1986 strengthening bond, the court of appeals held that, under federal law, the United States does not owe any implied duty of disclosure to a surety on an excise tax bond (Pet. App. A13). Since no express disclosure requirement existed under the strengthening bond, the court held that petitioner was obligated by its

terms to the United States in the amount of $600,000 (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly held that petitioner was not relieved of its liability under the 1986 strengthening bond. The federal statutes and regulations that govern distillery bonds place no duty on the United States to volunteer information to sureties. See 26 U.S.C. 5001 *et seq.*; 27 C.F.R. 19.231 *et seq.* The language of the bond also does not require the government to reveal any tax or financial information to the surety.[1] And, petitioner never requested such information from the United States. Instead, petitioner chose to rely on the assurances and "full collateral" that it obtained from other parties (Pet. App. A4-A5; Appellant's Excerpts of Record, Tab 8 at 17).

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[1] As the court of appeals correctly concluded, petitioner errs in asserting (Pet. 5-6) that the decision in the present case conflicts with *St. Paul Fire & Marine Insurance Co.* v. *Commodity Credit Corp.*, 646 F.2d 1064 (5th Cir. 1981). In the *St. Paul* case, the bond at issue explicitly required the government promptly to notify the surety of any default. *Id.* at 1070. No such requirement exists in the bonds at issue in this case.

Similarly, petitioner errs in asserting (Pet. 10-15) that the alleged negligence of ATF agents in collecting taxes due could provide a defense to enforcement of the bonds. As this Court noted in *Hart* v. *United States*, 95 U.S. 316, 318 (1877), the United States "never becomes bound to others for the consequences of [the negligence of its officers], unless it be by express agreement to that effect."

Soliciting such information from the United States would have been improper in any event because the Internal Revenue Code prohibits officers and employees of the United States from revealing "return information" of any taxpayer to third parties. 26 U.S.C. 6103 (1988 & Supp. IV 1992). The term "return information" is broadly defined to include any information gathered by the Treasury Department concerning a taxpayer's liability under the Internal Revenue Code. See 26 U.S.C. 6103(b)(2)(A); *Church of Scientology of California* v. *IRS*, 484 U.S. 9, 13-15 (1987). Since the Treasury Department collects distilled spirits taxes and requires surety bonds under the provisions of the Internal Revenue Code, information gathered by ATF concerning defaults in distillery excise tax payments would ordinarily constitute "return information" protected by 26 U.S.C. 6103. See *Ryan* v. *Bureau of Alcohol, Tobacco & Firearms*, 715 F.2d 644 (D.C. Cir. 1983). In particular, the government may not disclose a distiller's payment history or other financial information obtained in an ATF distiller's audit. The government is permitted to disclose return information to the taxpayer's designee pursuant to the taxpayer's written consent. 26 C.F.R. 301.6103(c)-1(a). Petitioner made no effort, however, to obtain such written consent from Bay River.

2. State common law principles of suretyship also do not relieve petitioner from its liability on the 1986 strengthening bond. In the first place, federal, rather than state, law controls the enforcement of distilled spirits bonds. See *United States* v. *Fulton Distillery, Inc.*, 571 F.2d 923, 926-927 (5th Cir. 1978), citing *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). The surety bond is mandatory under federal law. 26 U.S.C. 5173. Its terms are established by federal law.

The cause of action to enforce the bond is authorized by federal law. See 26 U.S.C. 7401; 26 U.S.C. 5173. Moreover, petitioner's basic complaints are that federal officials were not performing their governmental duties properly in regulating the distillery and that federal employees should disclose information otherwise protected by federal statutes (Pet. 10-15). See note 1, *supra*. There is a significant federal interest in establishing national rules of decision to avoid the "exceptional uncertainty" (*Clearfield Trust Co.* v. *United States*, 318 U.S. at 367) that would result from application of divers state laws to the rights and duties of the United States under these tax bonds.[2] See generally *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726-727 (1979).

Petitioner has erred, in any event, in its reliance (Pet. 5-6) on the common law principle of suretyship found in Restatement of Security § 124 (1941). That principle requires a creditor to inform the surety of facts material to the surety's obligation if the creditor "has reason to believe that those facts are unknown to the surety" and if the creditor "has a reasonable opportunity to communicate them to the surety." *Ibid.* This provision of the Restatement seeks to incorporate the fraud defense of contract law to the suretyship contract. Restatement of Security § 124, Comment (a). The rule "does not place any burden on the creditor to investigate for the surety's benefit * * * [or] require the creditor to take any

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[2] This case differs markedly from *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048 (1994). In that case, this Court held that state rules of decision appropriately govern state law tort claims in cases where the FDIC succeeds to the rights of a failed private institution. In the present case, the rights of the United States are those of a direct beneficiary under a bond required by federal law, not merely those of a successor in interest to the state law claim of another party.

unusual steps to assure himself that the surety is acquainted with facts *which he may assume are known to both of them.*" Restatement of Security § 124, Comment (b) (emphasis added). There is nothing in the record to suggest that any government officer knew that Bay River had supplied petitioner with false information about its financial position. Moreover, petitioner never requested any information from the government concerning the issuance of the strengthening bond. Even if the Restatement applied to this case, it would thus provide no defense to petitioner's liability under the bond.

3. As the courts below recognized (Pet. App. A9-A13), the claim of estoppel was insufficient in this case because petitioner did not establish that petitioner reasonably relied on any conduct of the government. To the contrary, petitioner appears to have relied on the assumption that its undertaking was fully collateralized by third parties. See page 4, *supra*. Petitioner had avenues available to it to evaluate the risk of issuing a strengthening bond that it simply did not pursue. Petitioner cannot credibly contend that it relied on the absence of information from the government when it never sought such information and when the disclosure of such information would not be permitted by federal law. See pages 6-7, *supra*.[3]

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[3] Petitioner incorrectly contends (Pet. 7) that the rejection of its estoppel claim in this case is inconsistent with *Lyng* v. *Payne*, 476 U.S. 926 (1986). In *Lyng*, the Court concluded that a claim *in addition to* estoppel was present in that case. See *id.* at 936. In this case, by contrast, the court of appeals fully considered and properly rejected on the merits each of the separate claims that petitioner raised, including its claim of estoppel.

4. Petitioner asserts that the construction of the terms of the original bond was inappropriate for summary judgment because a genuine issue of material fact exists as to whether the bond was a unit bond or a withdrawal bond. But petitioner has alleged no specific facts relating to the issuance of the bond to support that contention. The interpretation of the language of the bond therefore presented a question of law for the court. Summary judgment was therefore proper in this case. See, *e.g.*, *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256-257 (1986).

The district court and the court of appeals both concluded that the original bond was unambiguous and could be interpreted as a matter of law. The mere fact that the parties disagree as to the proper meaning of a contractual provision does not make the language of that agreement ambiguous. See *D.E.W., Inc.* v. *Local 93*, 957 F.2d 196, 199 (5th Cir. 1992). The inherently factual question whether this particular agreement was, or was not, ambiguous presents no conflict of decisions and does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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